Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 26 DECEMBER 16, 1992 No. 51

This issue contains:

AVAILABILITY OF BOUND VOLUMES
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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 92–112)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR NOVEMBER 1992

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: Thursday, November 26, 1992.

Greece drachma:

November 2, 1992	$0.004903
November 3, 1992	.004916
November 4, 1992	.004903
November 5, 1992	.004895
November 6, 1992	.004831
November 9, 1992	.004848
November 10, 1992	.004832
November 12, 1992	.004858
November 13, 1992	.004908
November 16, 1992	.004841
November 17, 1992	.004812
November 18, 1992	.004813
November 19, 1992	.004860
November 20, 1992	.004818
November 23, 1992	.004788
November 24, 1992	.004787
November 25, 1992	.004820
November 27, 1992	.004788
November 30, 1992	.004802

South Korea won:

November 2, 1992	$0.001273
November 3, 1992	.001274
November 4, 1992	.001274
November 5, 1992	.001274
November 6, 1992	.001274
November 9, 1992	.001274
November 10, 1992	.001273
November 12, 1992	.001273

FOREIGN CURRENCIES–Daily rates for countries not on quarterly list for November 1992 (continued):

South Korea won (continued):

November 13, 1992	$0.001274
November 16, 1992	.001273
November 17, 1992	.001271
November 18, 1992	.001269
November 19, 1992	.001267
November 20, 1992	.001267
November 23, 1992	.001265
November 24, 1992	.001264
November 25, 1992	.001266
November 27, 1992	.001268
November 30, 1992	.001269

Taiwan N.T. dollar:

November 2, 1992	$0.039413
November 3, 1992	.039382
November 4, 1992	.039389
November 5, 1992	.039389
November 6, 1992	.039308
November 9, 1992	.039347
November 10, 1992	.039289
November 12, 1992	N/A
November 13, 1992	.040000
November 16, 1992	.039308
November 17, 1992	.039283
November 18, 1992	.039306
November 19, 1992	.039339
November 20, 1992	.039343
November 23, 1992	.039283
November 24, 1992	.039285
November 25, 1992	.039293
November 27, 1992	.039300
November 30, 1992	.039290

(LIQ–03–01 S:NISD CIE)

Dated: December 2, 1992.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 92–113)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR NOVEMBER 1992

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 92–95 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: Thursday, November 26, 1992.

Austria schilling:

November 2, 1992	$0.090666
November 3, 1992	.090827
November 4, 1992	.091116
November 5, 1992	.090005
November 6, 1992	.089087
November 9, 1992	.089445
November 10, 1992	.089087
November 12, 1992	.089518
November 13, 1992	.090724
November 16, 1992	.089318
November 17, 1992	.088676
November 18, 1992	.089008
November 19, 1992	.089969
November 20, 1992	.089154
November 23, 1992	.088704
November 24, 1992	.088723
November 25, 1992	.089346
November 27, 1992	.088873
November 30, 1992	.089226

Belgium Franc:

November 2, 1992	$0.031027
November 3, 1992	.031075
November 4, 1992	.031008
November 5, 1992	.030788
November 6, 1992	.030497
November 9, 1992	.030609
November 10, 1992	.030395
November 12, 1992	.030618
November 13, 1992	.031056
November 16, 1992	.030544
November 17, 1992	.030367
November 18, 1992	.030479
November 19, 1992	.030826
November 20, 1992	.030479
November 23, 1992	.030321
November 24, 1992	.030312
November 25, 1992	.030479
November 27, 1992	.030395
November 30, 1992	.030497

FOREIGN CURRENCIES–Variances from quarterly rates for November 1992 (continued):

China P.R. reminbi yuan:

November 6, 1992	N/A
November 9, 1992	N/A
November 23, 1992	N/A
November 24, 1992	N/A
November 25, 1992	N/A

Denmark krone:

November 2, 1992	$0.166154
November 3, 1992	.166681
November 4, 1992	.166030
November 5, 1992	.164989
November 6, 1992	.163720
November 9, 1992	.164298
November 10, 1992	.163185
November 12, 1992	.164055
November 13, 1992	.166389
November 16, 1992	.164096
November 17, 1992	.163385
November 18, 1992	.162866
November 19, 1992	.163666
November 20, 1992	.160772
November 23, 1992	.160385
November 24, 1992	.160128
November 25, 1992	.162075
November 27, 1992	.161812
November 30, 1992	.162048

Finland markka:

November 2, 1992	$0.202061
November 3, 1992	.203066
November 4, 1992	.202184
November 5, 1992	.201045
November 6, 1992	.199661
November 9, 1992	.200080
November 10, 1992	.198610
November 12, 1992	.199720
November 13, 1992	.201857
November 16, 1992	.198059
November 17, 1992	.195351
November 18, 1992	.193050
November 19, 1992	.193050
November 20, 1992	.191205
November 23, 1992	.195122
November 24, 1992	.193424
November 25, 1992	.197628
November 27, 1992	.194628
November 30, 1992	.195274

France franc:

November 2, 1992	$0.188235
November 3, 1992	.188929
November 4, 1992	.188626
November 5, 1992	.187266

FOREIGN CURRENCIES–Variances from quarterly rates for November 1992 (continued):

France franc (continued):

November 6, 1992	$0.185391
November 9, 1992	.186272
November 10, 1992	.185408
November 12, 1992	.186602
November 13, 1992	.189251
November 16, 1992	.186341
November 17, 1992	.185615
November 18, 1992	.185563
November 19, 1992	.187441
November 20, 1992	.185391
November 23, 1992	.183824
November 24, 1992	.183554
November 25, 1992	.185219
November 27, 1992	.184410
November 30, 1992	.184723

Germany deutsche mark:

November 2, 1992	$0.638162
November 3, 1992	.639795
November 4, 1992	.637755
November 5, 1992	.633714
November 6, 1992	.627156
November 9, 1992	.629366
November 10, 1992	.625978
November 12, 1992	.629723
November 13, 1992	.638488
November 16, 1992	.627943
November 17, 1992	.625195
November 18, 1992	.626253
November 19, 1992	.633072
November 20, 1992	.627628
November 23, 1992	.624064
November 24, 1992	.624220
November 25, 1992	.627549
November 27, 1992	.625586
November 30, 1992	.627549

Ireland pound:

November 2, 1992	$1.679000
November 3, 1992	1.688500
November 4, 1992	1.684500
November 5, 1992	1.672500
November 6, 1992	1.659000
November 9, 1992	1.667500
November 10, 1992	1.658200
November 12, 1992	1.667500
November 13, 1992	1.690000
November 16, 1992	1.662500
November 17, 1992	1.654800
November 18, 1992	1.658000
November 19, 1992	1.673500

FOREIGN CURRENCIES–Variances from quarterly rates for November 1992 (continued):

Ireland pound (continued):

November 20, 1992	$1.651000
November 23, 1992	1.636500
November 24, 1992	1.635000
November 25, 1992	1.648000
November 27, 1992	1.640000
November 30, 1992	1.645500

Italy lira:

November 2, 1992	$0.000743
November 3, 1992	.000749
November 4, 1992	.000747
November 5, 1992	.000741
November 6, 1992	.000733
November 9, 1992	.000736
November 10, 1992	.000734
November 12, 1992	.000735
November 13, 1992	.000747
November 16, 1992	.000737
November 17, 1992	.000733
November 18, 1992	.000732
November 19, 1992	.000735
November 20, 1992	.000727
November 24, 1992	.000720
November 25, 1992	.000725
November 27, 1992	.000717
November 30, 1992	.000717

Netherlands guilder:

November 2, 1992	$0.567054
November 3, 1992	.568731
November 4, 1992	.566765
November 5, 1992	.562588
November 6, 1992	.557351
November 9, 1992	.559284
November 10, 1992	.556266
November 12, 1992	.559597
November 13, 1992	.567440
November 16, 1992	.558223
November 17, 1992	.555803
November 18, 1992	.556669
November 19, 1992	.562936
November 20, 1992	.557072
November 23, 1992	.554785
November 24, 1992	.554816
November 25, 1992	.557787
November 27, 1992	.556174
November 30, 1992	.557880

New Zealand dollar:

November 30, 1992	$0.510900

FOREIGN CURRENCIES–Variances from quarterly rates for November 1992 (continued):

Norway krone:

November 2, 1992	$0.156556
November 3, 1992	.157245
November 4, 1992	.156666
November 5, 1992	.155788
November 6, 1992	.154369
November 9, 1992	.154656
November 10, 1992	.153728
November 12, 1992	.154500
November 13, 1992	.156789
November 16, 1992	.154583
November 17, 1992	.153586
November 18, 1992	.153163
November 19, 1992	.154083
November 20, 1992	.154799
November 23, 1992	.155763
November 24, 1992	.150150
November 25, 1992	.153139
November 27, 1992	.152742
November 30, 1992	.154024

Portugal escudo:

November 2, 1992	$0.007151
November 3, 1992	.007179
November 4, 1992	.007148
November 5, 1992	.007085
November 6, 1992	.007032
November 9, 1992	.007075
November 10, 1992	.007039
November 12, 1992	.007085
November 13, 1992	.007174
November 16, 1992	.007080
November 17, 1992	.007050
November 18, 1992	.007070
November 19, 1992	.007082
November 20, 1992	.006918
November 23, 1992	.006961
November 24, 1992	.006983
November 25, 1992	.007045
November 27, 1992	.006957
November 30, 1992	.006981

South Africa, Republic of, rand:

November 2, 1992	$0.335683
November 3, 1992	.336361
November 4, 1992	.336700
November 5, 1992	.335121
November 6, 1992	.334896
November 9, 1992	.333890
November 10, 1992	.332668
November 12, 1992	.334840
November 13, 1992	.335289
November 16, 1992	.333389
November 17, 1992	.332226
November 18, 1992	.333222

FOREIGN CURRENCIES–Variances from quarterly rates for November 1992 (continued):

South Africa, Republic of, rand (continued):

November 19, 1992	$0.334728
November 20, 1992	.333611
November 23, 1992	.331675
November 24, 1992	.331675
November 25, 1992	.333056
November 27, 1992	.331126
November 30, 1992	.331895

Spain peseta:

November 2, 1992	$0.008962
November 3, 1992	.008981
November 4, 1992	.008941
November 5, 1992	.008843
November 6, 1992	.008764
November 9, 1992	.008801
November 10, 1992	.008745
November 12, 1992	.008812
November 13, 1992	.008914
November 16, 1992	.008796
November 17, 1992	.008735
November 18, 1992	.008737
November 19, 1992	.008836
November 20, 1992	.008766
November 23, 1992	.008588
November 24, 1992	.008647
November 25, 1992	.008712
November 27, 1992	.008652
November 30, 1992	.008705

Sri Lanka rupee:

November 2, 1992	N/A

Sweden krona:

November 2, 1992	$0.169348
November 3, 1992	.169967
November 4, 1992	.169434
November 5, 1992	.168464
November 6, 1992	.167112
November 9, 1992	.167490
November 10, 1992	.166223
November 12, 1992	.166945
November 13, 1992	.169549
November 16, 1992	.167001
November 17, 1992	.165906
November 18, 1992	.162602
November 19, 1992	.152439
November 20, 1992	.148588
November 23, 1992	.148588
November 24, 1992	.148148
November 25, 1992	.148588
November 27, 1992	.146843
November 30, 1992	.146135

FOREIGN CURRENCIES–Variances from quarterly rates for November 1992 (continued):

Switzerland franc:

November 2, 1992	$0.715052
November 3, 1992	.718133
November 4, 1992	.715308
November 5, 1992	.705716
November 6, 1992	.698568
November 9, 1992	.701016
November 10, 1992	.695652
November 12, 1992	.696864
November 13, 1992	.707714
November 16, 1992	.694927
November 17, 1992	.687285
November 18, 1992	.686813
November 19, 1992	.697350
November 20, 1992	.698324
November 23, 1992	.694444
November 24, 1992	.695749
November 25, 1992	.698812
November 27, 1992	.693481
November 30, 1992	.695652

United Kingdom pound:

November 2, 1992	$1.533000
November 3, 1992	1.547900
November 4, 1992	1.553500
November 5, 1992	1.538000
November 6, 1992	1.536500
November 9, 1992	1.520000
November 10, 1992	1.513000
November 12, 1992	1.523000
November 13, 1992	1.549000
November 16, 1992	1.518000
November 17, 1992	1.519000
November 18, 1992	1.520500
November 19, 1992	1.532000
November 20, 1992	1.521000
November 23, 1992	1.517500
November 24, 1992	1.519000
November 25, 1992	1.525000
November 27, 1992	1.509500
November 29, 1992	1.513500

(LIQ–03–01 S:NISD CIE)

Dated: December 2, 1992.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 92–114)

EXTENSION OF OILTEST, INC.'S CUSTOMS APPROVAL AND ACCREDITATIONS TO INCLUDE A NEW FACILITY

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of the extension of Oiltest, Inc.'s Customs approval and accreditations to include gauging and laboratory testing performed at a new facility.

SUMMARY: Oiltest, Inc., of Roselle, New Jersey, a Customs accredited commercial laboratory and approved gauger under 151.13 of the Customs Regulations (19 CFR 151.13), has been given an extension of its commercial gauger approval and commercial laboratory accreditations to cover its new facility located at Suite G, 9191 Winkler Drive, Glenbrook I Business Center, Houston, Texas 77017. The extension for the new facility includes a commercial gauger approval to perform the gauging of petroleum and petroleum products, organic chemicals in bulk and in liquid form and vegetable oils. Additionally, the extension includes Customs accreditations for the new facility to perform the following analyses: API Gravity, water by distillation, sediment by extraction, kinematic viscosity, percent by weight sulfur in petroleum products, percent by weight lead in petroleum products and distillation characteristics.

SUPPLEMENTARY INFORMATION: Part 151 of the Customs Regulations provides for the acceptance at Customs Districts of laboratory analyses and gauging reports for certain products from Customs accredited commercial laboratories and approved gaugers. Oiltest, Inc., which holds Customs accreditation for certain laboratory analyses and approval to gauge certain products, has applied to Customs to extend its laboratory accreditations and gauging approval in the manner described above. Review of Oiltest, Inc.'s qualifications shows that the extension is warranted and, accordingly, has been granted.

EFFECTIVE DATE: November 30, 1992.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Special Assistant for Commercial and Tariff Affairs, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Ave., NW, Washington, D.C. 20229 (202–927–1060).

Dated: December 1, 1992.

JOHN B. O'LOUGHLIN,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, December 7, 1992 (57 FR 57862)]

U.S. Customs Service

General Notice

COUNTRY OF ORIGIN MARKING FOR BEEF JERKY

TO: Regional Commissioners.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of country of origin marking requirements.

SUMMARY: All Customs offices are advised that country of origin marking requirements apply to beef jerky which is sliced and/or repacked after importation. Importers of beef jerky should be requested to execute the repacking certification provided for under 19 CFR 134.25. USDA will approve new labeling for beef jerky which indicates foreign origin as required under the Tariff Act.

SUPPLEMENTARY INFORMATION:

Background

In mid-1991, Customs suspended several actions to enforce country of origin marking requirements for imported beef jerky which was being repacked after importation under the supervision of the U.S. Department of Agriculture (USDA). We took this action after learning that USDA had a different approach to country of origin marking, and that importers and packers might be subject to conflicting country of origin marking requirements. Customs has consulted at length with USDA in an effort to harmonize and coordinate the two agencies' approaches to marking. These consultations will continue.

Discussion

It has been and remains the Customs position that meat products which are subjected to minimal processing after importation (such as slicing and/or repackaging), are not substantially transformed, and remain articles of foreign origin for tariff purposes. Such articles are subject to the requirements of 19 CFR 134.25 regarding importers certifications and subsequent marking of repacked articles and, as Customs stated in T.D. 83–155, (implementing 19 CFR 134.25), repackaged meat articles would be covered by this requirement. Beef jerky imported in bulk for slicing and repackaging is an example of such an article.

At this time Customs has not reached complete agreement with USDA as to the types of meat processing operations would be considered to effect substantial transformation, relieving meat articles so proc-

essed from marking requirements. There will be further developments on this broader issue. However, USDA has advised Customs that it will not object to Customs enforcement of repackaging and marking requirements for beef jerky as described above. USDA, acting under its Federal Meat Inspection Act authority, will cooperate by approving new labels which will be marked in accordance with Tariff Act requirements. Such approval will be given to all labels which USDA can confirm as stating accurately the country of origin of the beef jerky.

With this degree of cooperation between Customs and USDA, importers of beef jerky will no longer be able to claim that USDA takes a different position with respect to marking. Customs enforcement of marking requirements for beef jerky should proceed without incident.

ACTION

All Customs offices are advised that country of origin marking requirements apply to beef jerky which is sliced and/or repacked after importation. The principal method of enforcement is the importers certification and notice to subsequent repackers under 19 CFR 134.25. However, all available means should be employed to assure that the ultimate purchasers of imported beef jerky in the U.S. are advised of its foreign origin.

Within the discretion of local Customs offices, importers and repackers should be afforded reasonable time in which to secure appropriate label approval from USDA for repacked material. Any instances in which label approval cannot be secured from USDA, or any other administrative difficulties, should be reported to the Chief, Value and Marking Branch, Office of Regulations and Rulings, (202) 482–7010.

Dated: November 20, 1992.

KAREN HIATT,
(for Samuel H. Banks, Assistant Commissioner,
Office of Commercial Operations)

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 4 and 122

RIN 0607–AA15

AMENDMENTS TO THE FOREIGN TRADE STATISTICS, VESSELS IN FOREIGN AND DOMESTIC TRADES, AND AIR COMMERCE REGULATIONS

AGENCIES: Bureau of the Census, Department of Commerce; and U.S. Customs Service, Department of Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: It is proposed to amend both the Foreign Trade Statistics Regulations (FTSR) of the Census Bureau and the U.S. Customs Regulations to change the procedure for carriers submitting Shipper's Export Declarations (SEDs) and outward cargo manifests for shipments from the United States to Puerto Rico. Pursuant to the proposal, effective January 1, 1993, exporting carriers will submit the SEDs and outward cargo manifest for such shipments to the District Director of Customs in Puerto Rico rather than at the port of departure. Furthermore, aircraft carrying merchandise on direct flights between the United States and Puerto Rico will be required to file complete manifests.

This action is being proposed as an effort to improve the accuracy and coverage of the statistics on shipments from the United States to Puerto Rico. The quality of such data is in question because some exporters and carriers treat such shipments as "domestic" and are unfamiliar with the requirements for SEDs and manifests. This program will allow both the Census Bureau and the Customs Service to better scrutinize compliance by providing for filing these SEDs and manifests in Puerto Rico rather than at the various ports in the United States. Additionally, the Census Bureau is establishing an office in Puerto Rico to process SEDs for all shipments to and from the United States. This proposed rule affects only carriers transporting merchandise between the United States and Puerto Rico. It does not change any requirements for exporters.

DATES: Comments must be received by January 29, 1993.

ADDRESSES: Address all comments concerning these proposed regulations to the Regulations Branch, Foreign Trade Division, Bureau of the Census, Washington, DC 20233.

FOR FURTHER INFORMATION CONTACT: Harold L. Blyweiss, Chief, Regulations Branch, Foreign Trade Division, Bureau of the Census, (301) 763–5310.

SUPPLEMENTARY INFORMATION: The Census Bureau collects SEDs to compile statistics on U.S. trade with Puerto Rico under the authority of section 301 of Title 13, United States Code (U.S.C.). Furthermore, section 303 of Title 13, U.S.C., directs the Secretary of the Treasury (Customs) to collect information in the form and manner prescribed by the regulations issued pursuant to this chapter.

The government of Puerto Rico uses the summary data from the SEDs to assess the economic health of Puerto Rico as it relates to overall production, employment, and payroll, as well as specific industries. The monthly trade data, an integral part of Puerto Rico's calculation of its Gross National Product, also serve as a proxy for other economic data available only annually or every 5 years.

Trade between the United States and Puerto Rico is significant. In 1991, two-way trade amounted to $29.5 billion. If Puerto Rico were an independent country, it would rank tenth in U.S. exports ($10.8 billion) and seventh in U.S. imports ($18.7 billion) with total trade equivalent to U.S. trade with France.

Currently, carriers transporting goods to Puerto Rico, while not subject to formal Customs clearance procedures, must be granted permission to depart by Customs in the port of departure. Such permission is contingent upon the filing of manifests and SEDs. If the exporting carrier is operating under the bonding provision of these regulations, permission to depart for Puerto Rico may be granted by the Customs Director provided that a complete manifest and all required SEDs shall be filed by the carrier not later than the seventh business day after departure.

Some exporters and carriers treat shipments to Puerto Rico as a "domestic" movement and are unfamiliar with the requirements for filing SEDs and manifests. Additionally, since Puerto Rico is inside the Customs Territory of the United States, such shipments are not subject to the same scrutiny by the Customs Service as a shipment to a foreign country. Therefore, compliance with SED and manifest requirements is not consistent with obtaining quality statistics. Over the past 5 years increased scrutiny of SED and manifest requirements for shipments from Puerto Rico to the United States, by both the Census Bureau and the Customs Service, resulted in a marked improvement in the accuracy and completeness of the northbound data. Based on this experience, the Census Bureau and the Customs Service are proposing to amend their respective regulations to require that, effective January 1, 1993, carriers submit their SEDs and outward cargo manifests for southbound shipments to the District Director of Customs in Puerto Rico rather than at the U.S. port of departure. Also, aircraft carrying merchandise on direct flights between the United States and Puerto Rico will be

required to file complete manifests as opposed to manifesting only cargo for which SEDs are either not required or not available.

To further support the effort to obtain complete and accurate statistics on U.S. trade with Puerto Rico, the Census Bureau is establishing a processing office in Puerto Rico so as to better monitor the trade, provide assistance, and to produce data responsive to the needs of both the Government and the trade. Additionally, the Customs Service is increasing their staff in Puerto Rico to ensure compliance and to further assist the trade as well as the Census Bureau in these efforts.

Under this proposal, carriers will be granted permission to depart for Puerto Rico by the Customs Director at the port of departure without requiring the filing of outward cargo manifests or SEDs. These documents will instead be filed with the Customs Director at the port of entry in Puerto Rico within one business day after arrival. The bonding provisions of these regulations are being amended to allow such carriers to file their complete manifest and all required SEDs not later than the seventh business day *after* arrival in Puerto Rico. If adopted, several sections in Subpart B–General Requirements – Exporting Carriers of the FTSR (15 CFR part 30) and in parts 4 and 122 of the Customs Regulations (19 CFR parts 4 and 122) will be amended as set forth below.

This proposed rule does *not* change any requirements for individual exporters of merchandise being shipped from the United States to Puerto Rico. U.S. exporters, or their agents, will continue to prepare the SEDs and submit them to the exporting carrier in the United States prior to exportation.

These proposed amendments do not meet the criteria of a major rule as set forth in section 1(b) of Executive Order 12291; therefore, no Regulatory Impact Analysis is required. This proposed rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612. Pursuant to the Provisions of the Regulatory Flexibility Act of 1980 (Pub. L. 96–354), the General Counsel of the Department of Commerce and the Commissioner of Customs certify to the Small Business Administration that the proposed regulations, if promulgated, will not have a significant economic effect on a substantial number of small entities because they only change the place of filing shipping documents by exporting carriers. The information collection requirements in this rule are cleared under OMB Control Nos. 0607–0001, 0018, and 0152 pursuant to the Paperwork Reduction Act of 1980 (Pub. L. 96–511).

List of Subjects

15 CFR Part 30

Economic statistics, Foreign trade, Reporting and recordkeeping requirements.

19 CFR Part 4

Customs duties and inspection, Exports, Freight, Harbors, Maritime carriers, Reporting and recordkeeping requirements, Vessels.

19 CFR Part 122

Administrative practice and procedure, Air carriers, Aircraft, Airports, Customs duties and inspection, Freight, Penalties, Reporting and recordkeeping requirements.

To effect these changes, it is proposed to amend the Foreign Trade Statistics Regulations (15 CFR part 30) and the Customs Regulations (19 CFR parts 4 and 122) as set forth below:

TITLE 15 – COMMERCE AND FOREIGN TRADE

PART 30 – FOREIGN TRADE STATISTICS

1. The authority citation for 15 CFR part 30 is revised to read as follows:

Authority: 5 U.S.C. 301; 13 U.S.C. 301–307; Reorganization Plan No. 5 of 1950 (3 CFR 1949–1953 Comp., p. 1004), Department of Commerce Organization Order No. 35–2A, August 4, 1975, 40 FR 42765.

2. Section 30.20 is amended by revising the first sentence of paragraph (a), redesignating paragraphs (b) and (c) as paragraphs (c) and (d) respectively, and adding new paragraph (b) to read as follows:

§ 30.20 General statement of requirement for the filing of manifests and Shipper's Export Declarations by carriers.

(a) Carriers transporting merchandise from the United States, Puerto Rico, or U.S. Possessions to foreign countries; from the United States or Puerto Rico to the Virgin Islands of the United States; or from Puerto Rico to the United States; shall not be granted clearance, where clearance is required, and shall not depart, where clearance is not required, until manifests (for vessels, aircraft, and rail carriers) and Shipper's Export Declarations have been filed with the Customs Director as specified in paragraphs (b) through (d) of this section, except as provided in § 30.24. * * *

(b) For carriers transporting merchandise from the United States to Puerto Rico, the complete manifest, as required, and all required Shipper's Export Declarations shall be filed within one business day after arrival, as defined in 19 CFR 4.2(b), with the Customs Director in Puerto Rico, except as provided in § 30.24.

* * * * * * *

3. Section 30.21 is amended by revising paragraphs (a) and (b) to read as follows:

§ 30.21 Requirements for the filing of manifests.

(a) *Vessels.* Vessels transporting merchandise as specified in § 30.20 (except vessels exempted by paragraph (d) of this section) shall file a complete Cargo Declaration, Customs Form 1302, or a Cargo Declaration Outward With Commercial Forms, Customs Form 1302–A, either form with copies of bills of lading or equivalent commercial forms relating to all cargo encompassed by the manifest attached thereto. The

manifest shall be filed with the Customs Director at the respective ports where the merchandise is laden (for shipments from the United States to Puerto Rico, the manifest shall be filed with the Customs Director in the port where the merchandise is unladen in Puerto Rico), and shall show the destination of the vessel and list all the cargo so laden. For each item of cargo, the manifest shall show a description of the articles, contents, quantities, and values; however, a notation on the Cargo Declaration that values are as stated on the Shipper's Export Declarations, copies of which are attached to such manifest, will be accepted. There shall also be shown for each item of cargo the bill of lading number on the Shipper's Export Declaration covering the item, except that bill of lading numbers are not required on manifests covering cargo destined for Canada or a nonforeign area. If an item on a Cargo Declaration is one for which a Shipper's Export Declaration is not required, a notation shall be inserted on the Cargo Declaration as to the basis for the exemption with a reference to the number of the section in the regulations where the particular exemption is provided. The bills of lading, cargo lists, or other commercial forms must be securely attached to the Cargo Declaration in such manner as to constitute one document; that they are incorporated by suitable reference on the face of the form such as "Cargo as per bills of lading attached," or "Cargo as per commercial forms attached," and that there is shown on the face of each bill the information required by the Cargo Declaration for the cargo covered by that document. The manifest of vessels (including vessels taking bunker fuel to be laden aboard vessels on the high seas) clearing for foreign countries shall also show the quantities and values of bunker fuel taken aboard at that port for fueling use of the vessel, apart from such quantities as may have been laden on vessels as cargo. The quantity of coal shall be reported in metric tons (2,240 pounds), and the quantity of fuel oil shall be reported in barrels of 158.98 liters (42 gallons). Fuel oil shall be described in such manner as to identify diesel oil as distinguished from other types of fuel oil.

(b) *Aircraft.* Aircraft transporting merchandise as specified in § 30.20 shall file a complete manifest on Customs Form 7509. Such manifest shall be filed with the Customs Director at the respective ports where the merchandise is laden (for shipments from the United States to Puerto Rico, the manifests shall be filed with the Customs Director in the port where the merchandise is unladen in Puerto Rico) aboard the aircraft which is to carry the merchandise to the foreign country or to its ultimate destination in a nonforeign area, and shall list all the cargo so laden and show, for each item, the air waybill number or marks and numbers on packages, the number of packages, and the nature of the goods, except as otherwise provided in this paragraph (b). In addition, for any item for which a Shipper's Export Declaration is not required under the regulations in this part, a notation as to the basis for the exemption with a reference to the number of the section in this part where the particular exemption is provided, shall be inserted on the manifest,

or on the waybill filed in lieu of listing on the manifest. In the case of shipments on an air waybill, a copy of each document may be attached to the cargo manifest, the numbers of such air waybills listed in the body of the manifest, and the statement "Cargo as per Air Waybills Attached" noted on the manifest. On direct departures only, for shipments requiring a Shipper's Export Declaration a copy of each declaration may be attached to the cargo manifest. In such case the air waybill numbers of such declarations shall be listed on the cargo manifest in the column for air waybill numbers, and the statement "Cargo as per SEDs Attached" noted on the manifest. Under this alternative procedure, any shipments not requiring a Shipper's Export Declaration shall be listed on the manifest, and a notation as to the basis for the exemption with a reference to the number of the section in this part where the particular exemption is provided, shall be shown.

* * * * * * *

4. Section 30.22 is amended by revising paragraph (a) to read as follows:

§ 30.22 Requirements for the filing of Shipper's Export Declarations by departing carriers.

(a) To meet the requirements of § 30.20 for the filing of SEDs, every departing carrier transporting merchandise as specified in § 30.20 including vessels, aircraft, rail carriers, trucks and other vehicles, ferries, and every other carrier shall deliver to the Customs Director at the port of exportation (for shipments from the United States to Puerto Rico, at the port of arrival in Puerto Rico), with the manifest of the carrier, if a manifest is required by the regulations in this part, Shipper's Export Declarations prepared and signed by the exporters, or their agents, covering all the cargo for which such SEDs are required by the regulations in this part.

* * * * * * *

5. Section 30.24 is amended by revising paragraphs (a) introductory text and (a)(1) to read as follows:

§ 30.24 Clearance or departure of carriers under bond on incomplete manifest or Shipper's Export Declarations.

(a) For purposes of the regulations in this part, except when carriers are transporting merchandise from the United States to Puerto Rico, clearance (where clearance is required), permission to depart (where clearance is not required) may be granted to any carrier by the Customs Director prior to the filing of a complete manifest as required under the regulations in this part, or prior to the filing by the carrier of all required Shipper's Export Declarations, provided that a bond as specified in paragraph (b) of this section is filed with the Customs Director. The condition of the bond shall be that a complete manifest, where a manifest is required by the regulations in this part and all required Shipper's Export Declarations, shall be filed by the carrier not later than the fourth

business day after clearance (where clearance is required or departure (where clearance is not required) of the carrier except as otherwise specifically provided in paragraphs (a) (1) and (2) of this section. For carriers transporting merchandise from the United States to Puerto Rico, if the complete manifest, as required, and all required Shipper's Export Declarations are not available for filing with the Customs Director in Puerto Rico within one business day after arrival, a bond, as specified in paragraph (b) of this section shall be filed.

(1) For shipments aboard a U.S. flag carrier between the United States and Puerto Rico, or from the United States or Puerto Rico to the Virgin Islands of the United States, the condition of the bond shall be that a complete manifest (where a manifest is required) and all required Shipper's Export Declarations shall be filed by the carrier not later than the seventh business day after departure or in the case of shipments from the United States to Puerto Rico, the seventh business day after arrival.

* * * * * * *

TITLE 19—CUSTOMS DUTIES

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

6. The general authority citation for 19 CFR part 4 and the specific authority for Section 4.84 would continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 2103 and 46 U.S.C. App. 3;

* * * * * * *

Section 4.84 also issued under 13 U.S.C. 303; 19 U.S.C. 1433, 1435, 1437; 46 U.S.C. App. 91, 313, 314, 883–1;

* * * * * * *

7. Section 4.84 is amended by revising paragraph (c) to read as follows:

§ 4.84 Trade with noncontiguous territory.

* * * * * * *

(c)(1) A vessel which is not required to clear but which is transporting merchandise from a port in any State or the District of Columbia to any noncontiguous territory of the United States (excluding Puerto Rico), or from Puerto Rico to any State or the District of Columbia, or any other noncontiguous territory, shall not be permitted to depart without filing a complete manifest, when required by regulations of the Bureau of the Census (15 CFR part 30), and all required Shipper's Export Declarations, unless before the vessel departs an approved bond is filed for the timely production of the required documents, as specified in 15 CFR 30.24. Requests for permission to depart may be written or oral and permission to depart shall be granted orally by the appropriate Customs officer. However, if the request is to depart prior to the filing of the

required manifest and export declarations, permission shall not be granted unless the appropriate bond is on file. In the latter case, the Customs officer shall keep a simplified record of the necessary information in order to assure that the manifest and export declarations are filed within the required time period. The Master's Oath on Entry of Vessel in Foreign Trade, Customs Form 1300 (see § 4.63(a)), required at the time of clearance is not required to be taken to obtain permission to depart.

(2) A vessel which is not required to clear but which is transporting merchandise from a port in any State or the District of Columbia to Puerto Rico shall file a complete manifest, when required by the regulations of the Bureau of the Census (15 CFR part 30), and all required Shipper's Export Declarations within one business day after arrival, as defined in section 4.2(b) of this part, with the appropriate Customs officer in Puerto Rico. If the complete manifest and all required Shipper's Export Declarations are not filed with the appropriate Customs officer within that time frame, an appropriate bond shall be filed with the Customs officer for the timely production of the required documents as specified in 15 CFR 30.24. In these instances when a bond is filed, the Customs officer shall keep a simplified record of the necessary information in order to ensure that the manifest and export declarations are filed not later than the seventh business day after arrival in Puerto Rico.

* * * * * * *

PART 122—AIR COMMERCE REGULATIONS

8. The authority for 19 CFR part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 13 U.S.C. 303; 19 U.S.C. 58b, 66, 1433, 1436, 1459, 1590, 1594, 1623, 1624, 1644; 49 U.S.C. App. 1509.

9. Section 122.62 is amended by revising paragraph (a) to read as follows:

§ 122.62 Aircraft not otherwise required to clear.

(a) *Bureau of the Census.* Under Bureau of the Census Regulations (15 CFR part 30), aircraft not required to clear by § 122.61 shall obtain permission to depart if carrying merchandise from the U.S. to Puerto Rico or from Puerto Rico to the U.S.

* * * * * * *

10. Section 122.74 is amended by revising paragraphs (a) and (c)(2) to read as follows:

§ 122.74 Incomplete (pro-forma) manifest.

(a) *Application*—(1) *Shipments to foreign countries.* Except for aircraft bound for foreign locations referred to in paragraph (b) of this section, clearance, or permission to depart may be given to an aircraft bound for a foreign location by the district director in the port of departure before a complete manifest or all required Shipper's Export Declarations have been filed, if a proper bond is filed on Customs Form 301,

containing the bond conditions set forth in subpart G of part 113 of this chapter.

(2) *Shipments to Puerto Rico.* As provided in § 122.79(b), any required air cargo manifest or Shipper's Export Declarations for direct flights between the U.S. and Puerto Rico shall be filed with the appropriate Customs officer upon arrival in Puerto Rico. If any required manifest or Shipper's Export Declarations are not filed with the appropriate Customs officer within one business day after arrival in Puerto Rico, a proper bond shall be filed at that time on Customs Form 301, containing the bond conditions set forth in subpart G of part 113 of this chapter.

* * * * * * *

(c) * * *

(2) *Shipments to and from Puerto Rico.* For shipments from the U.S. and Puerto Rico, the complete manifest (when required) and all required Shipper's Export Declarations shall be filed not later than the seventh business day after arrival into Puerto Rico. For shipments from Puerto Rico to the U.S., the complete manifest (when required) and all required Shipper's Export Declarations shall be filed not later than the seventh business day after departure from Puerto Rico.

* * * * * * *

11. Section 122.76 is revised to read as follows:

§ 122.76 Shipper's Export Declarations and inspection certificates.

(a) *Shipper's Export Declarations* (1) *Other than shipments to Puerto Rico.* For shipments other than to Puerto Rico, at the time of clearance, the aircraft commander or agent shall file with the district director at the departure airport any Shipper's Export Declarations required by the Bureau of Census (see 15 CFR part 30).

(2) *Shipments to Puerto Rico.* For flights carrying shipments to Puerto Rico from the U.S., the aircraft commander or agent shall file any Shipper's Export Declarations required by the Bureau of Census (see 15 CFR part 30) upon arrival in Puerto Rico with the district director there.

(b) *Inspection certificates.* The aircraft commander or authorized agent shall deliver a proper export inspection certificate issued by the Veterinary Service, Animal and Plant Inspection Service, Department of Agriculture (9 CFR part 91), to the Customs officer in charge at the time of departure of any aircraft carrying horses, mules, asses, cattle, sheep, swine, or goats.

12. It is proposed to amend § 122.79 by revising paragraph (b) to read as follows:

§ 122.79 Shipments to U.S. possessions.

* * * * * * *

(b) *Puerto Rico.* When an aircraft carries merchandise on a direct flight from the U.S. to Puerto Rico, any required air cargo manifest or

Shipper's Export Declarations shall be filed with the district director at Puerto Rico.

BARBARA EVERITT BRYANT,
Director,
Bureau of the Census.

CAROL B. HALLETT,
Commissioner,
U.S. Customs Service.

Approved and concurred: September 21, 1992.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, November 30, 1992 (57 FR 56531)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

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Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
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James L. Watson

Herbert N. Maletz

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Samuel M. Rosenstein

Clerk

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Decisions of the United States Court of International Trade

(Slip Op. 92–206)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF FRANCE S.A., SKF GMBH, SKF INDUSTRIE, S.P.A., SKF (U.K.) LTD., SKF SVERIGE, AB, FAG KUGELFISCHER GEORG SCHAFER KGAA, FAG CUSCINETTI S.P.A., FAG (UK) LTD., BARDEN CORP. (UK) LTD., FAG BEARINGS CORP., BARDEN PRECISION BEARINGS CORP., RHP BEARINGS, RHP BEARINGS INC., PEER BEARING CO., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., NSK CORP., SNR ROULEMENTS, NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., AND NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, DEFENDANT-INTERVENORS

Court Nos. 92–06–00422, etc.

(See attached schedule)

Defendant requests this Court to grant leave to correct certain alleged ministerial errors contained in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360 (1992).

Held: Fairness requires that final results of administrative reviews be as error free as possible. In addition, it is clear that allowing the Department of Commerce, International Trade Administration, to correct ministerial errors at the beginning of the extended process of judicial review of final agency action will allow the parties to focus on the true issues of contention between them, save time and increase efficiency. All parties will be allowed to amend their pleadings to conform with the amended final results.

[Defendant's motion for leave to correct ministerial errors granted.]

(Dated November 23, 1992)

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley, Joseph A. Perna, V* and *Larry Hampel*) for plaintiff, plaintiff-intervenor and defendant-intervenor Federal-Mogul Corporation.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Wesley K. Caine, Robert A. Weaver, John M. Breen, Myron A. Brilliant, Margaret E. O. Edozien, Amy S. Dwyer, Lane S. Hurewitz* and *Margaret L. H. Png*) for plaintiff, plaintiff-intervenor and defendant-intervenor The Torrington Company.

Powell, Goldstein, Frazer & Murphy (*Richard M. Belanger, Neil R. Ellis* and D. *Christine Wood*) for plaintiff Caterpillar Inc.

Baker & McKenzie (*Kevin M. O'Brien, Linda N. Bogin* and *Michael A. Lawrence*) for plaintiff Emerson Power Transmission Corporation.

Grunfeld, Desiderio, Lebowitz & Silverman (*Max F. Schutzman* and *Andrew B. Schroth*) for plaintiffs and defendant-intervenors FAG Kugelfischer Georg Schafer KGaA, FAG Cuscinetti SpA, FAG (UK) Limited, Barden Corporation (UK) Limited, FAG Bearings Corporation, The Barden Corporation and Barden Precision Bearings Corporation.

Arent Fox Kintner Plotkin & Kahn (*Stephen L. Gibson*) for plaintiffs INA Walzlager Schaeffler KG and INA Bearing Co., Inc.

Coudert Brothers (*Robert A. Lipstein* and *Christer L. Mossberg*) for plaintiff Inoue Jikuuke Kogyo Co., Ltd.

Powell, Goldstein, Frazer & Murphy (*Peter O. Suchman, Neil R. Ellis, T. George Davis* and *Niall P. Meagher*) for plaintiffs and defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

O'Melveny & Myers (*Greyson L. Bryan, Bruce R. Hirsh* and *Steven A. Spencer*) for plaintiffs Nachi-Fujikoshi Corporation, Nachi-America, Inc. and Nachi Technology, Inc.

Tanaka Ritger & Middleton (*H. William Tanaka, Michele N. Tanaka* and *Michael J. Brown*) for plaintiffs Nippon Pillow Block Sales Co., Ltd. and FYH Bearing Units USA, Inc.

Coudert Brothers (*Robert A. Lipstein, Matthew P. Jaffe, Nathan V. Holt* and *Grace W. Lawson*) for plaintiffs and defendant-intervenors NSK Ltd. and NSK Corporation.

Barnes, Richardson & Colburn (*Robert E. Burke, Donald J. Unger, Kazumune V. Kano* and *Diane A. MacDonald*) for plaintiffs and defendant-intervenors NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Kugellagerfabrik (Deutschland) GmbH and NTN Corporation.

Venable, Baetjer, Howard & Civiletti (*John M. Gurley* and *Lindsay B. Meyer*) for plaintiff and defendant-intervenor Peer Bearing Company.

Donohue and Donohue (*William J. Phelan*) for plaintiff Pratt & Whitney Canada, Inc.

Covington & Burling (*Harvey M. Applebaum, David R. Grace* and *Michael P. Socarras*) for plaintiffs and defendant-intervenors RHP Bearings, RHP Bearings Inc. and United Precision Industries, Ltd.

Howrey & Simon (*Herbert C. Shelley, Alice A. Kipel, Juliana M. Cofrancesco* and *Thomas J. Trendl*) for plaintiffs and defendant-intervenors SKF USA Inc., SKF France S.A., SKF GmbH, SKF Industrie, S.p.A., SKF (U.K.) Limited and SKF Sverige, AB.

Grunfeld, Desiderio, Lebowitz & Silverman (*Bruce M. Mitchell, David L. Simon, Philip S. Gallas, Andrew B. Schroth* and *Matthew L. Pascocello*) for plaintiff and defendant-intervenor Societe Nouvelle de Roulements.

Willkie Farr & Gallagher (*William J. Clinton, James P. Durling* and *Barbara K. Summers*) for plaintiffs Yamaha Motor Co., Ltd. and Yamaha Motor Corp., U.S.A.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Marc E. Montalbine*); of counsel: *Stephen J. Claeys, Craig R. Giesze* and *Dean A. Pinkert*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Grunfeld, Desiderio, Lebowitz & Silverman (*Bruce M. Mitchell* and *Philip S. Gallas*) for defendant-intervenor GMN Georg Muller Nurnberg AG.

OPINION

TSOUCALAS, *Judge:* Defendant, the Department of Commerce, International Trade Administration ("ITA"), requests this Court to grant leave for the ITA to correct alleged ministerial errors contained in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 57 Fed. Reg. 28,360 (1992).

BACKGROUND

After the ITA published the Final Results for the second administrative review of imports of antifriction bearings from various countries, the ITA disclosed its calculations of the dumping margins to interested parties who requested access. After disclosure, the ITA accepted comments on alleged ministerial errors contained in the Final Results pursuant to 19 U.S.C. § 1675(f) (1988) and 19 C.F.R. § 353.28 (1992).

ITA analyzed the comments it received on alleged ministerial errors and determined which allegations were valid.

ITA was able to publish amended final results correcting the ministerial errors it had found only for certain countries, companies and products. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. 32,969 (1992). ITA was unable to publish corrected final results for the errors now at issue before this Court because Federal-Mogul Corporation ("Federal-Mogul"), NTN Bearing Corporation of America, NTN Bearing Manufacturing Corporation and NTN Corporation, Nippon Pillow Block Sales Co., Ltd. and FYH Bearing Units USA, Inc. each filed a summons with this Court invoking this Court's exclusive jurisdiction before the errors could be corrected.

Therefore, on September 1, 1992, defendant filed a motion asking this Court to grant defendant leave to correct certain ministerial errors and issue amended final results in these actions. *Defendant's Motion for Leave to Correct Ministerial Errors.*

SKF USA Inc., SKF France S.A., SKF GmbH, SKF Industrie, S.p.A., SKF (U.K.) Limited and SKF Sverige, AB, NSK Ltd. and NSK Corporation, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., Inoue Jikuuke Kogyo Co., Ltd. and Caterpillar Inc. support defendant's motion. *Response of SKF USA Inc., SKF France S.A., SKF GmbH, SKF Industrie, S.p.A., SKF (U.K.) Limited and SKF Sverige, AB, in Support of Defendant's Motion for Leave to Correct Ministerial Errors; Plaintiffs' (NSK) Reply Memorandum in Support of Defendant's Motion for Leave to Correct Ministerial Errors; Plaintiffs' (Koyo) Response to Defendant's Motion for Leave to Correct Ministerial Errors; Plaintiff's (Inoue Jikuuke Kogyo Co., Ltd.) Reply Memorandum in Support of Defendant's Motion for Leave to Correct Ministerial Errors; Plaintiff's (Caterpillar Inc.) Response to Defendant's Motion for leave to Correct Ministerial Errors.* FAG Kugelfischer Georg Schafer KGaA, FAG Cuscinetti SpA, FAG (UK) Limited, Barden Corporation (UK) Limited, FAG Bearings Corporation and The Barden Corporation (collectively "FAG") also support the defendant's motion but ask that the Court require the ITA to correct an alleged ministerial error in regard to FAG Cuscinetti's dumping margin which is not covered by defendant's motion. Specifically, the alleged error is the inadvertent omission of home market inventory carrying costs from the pool of home market indirect selling expenses subject to the ESP offset in cases where US price was compared to constructed value. *Response of Defendant-Intervenor and Plaintiff, FAG, in Support of Government's Motion for Leave to Correct Ministerial Errors.*

Federal-Mogul and The Torrington Company ("Torrington") oppose the defendant's motion. *Federal-Mogul Corporation's Response to Defendant's Motion for Leave to Correct Ministerial Errors* ("*Federal-*

Mogul's Response"); *Opposition to Defendant's Motion for Leave to Correct Ministerial Errors* ("*Torrington's Opposition*").

ITA specifically requests leave to correct the following errors:

I. BALL BEARINGS

A. *France:*

1. For Pratt & Whitney Canada, Inc., application of a level of trade adjustment to home market unit prices that were adjusted for discounts and rebates rather than to Pratt & Whitney's gross price list unit prices.

2. For SKF France, setting of home market commissions at zero, and treatment of warranty and technical service expenses as both indirect and direct expenses.

3. For SNR Roulements, double-counting of commissions and U.S. inland freight expenses; making of a typographical error in connection with domestic inland insurance; and failure to implement a variable for physical differences in merchandise as specified in the final results of the administrative review.

B. *Germany:*

1. For FAG Germany, computer program's failure to eliminate FAG Germany's home market family matches where all home market sales were below cost, and the setting of some indirect selling expenses at zero; making of an adjustment for differences in merchandise for some constructed value comparisons and failure to include home market inventory carrying costs in constructed value comparisons; and addition of imputed credit costs and inventory carrying costs to FAG Germany's cost of production for the home market cost test.

2. For Pratt & Whitney Canada, Inc., application of a level of trade adjustment to home market unit prices that were adjusted for discounts and rebates rather than to Pratt & Whitney's gross price list unit prices.

3. For SKF Germany, addition (rather than subtraction) of billing adjustment #2 to indirect selling expenses; failure to delete billing adjustment #2 from adjusted home market price when applying the sales below cost test; and computer program's treatment of warranty and technical service expenses as both indirect and direct expenses.

C. *Italy:*

1. For FAG Italy, inclusion of inventory carrying costs and credit expenses in the calculation of cost of production; application of an adjustment for differences in merchandise to the constructed value comparisons; exclusion of the home market indirect selling expense variable from the constructed value margin calculations; and double-counting of inventory write-offs in calculating cost of production.

2. For SKF Italy, addition (rather than subtraction) of billing adjustment #2 to indirect selling expenses; failure to delete billing adjustment #2 from adjusted home market price when applying the sales below cost test; and computer program's treatment of war-

ranty and technical service expenses as both indirect and direct expenses.

D. *Japan:*

1. For Inoue Jikuuke Kogyo Co., Ltd. ("IJK"), calculation of constructed values for particular parts using purchase price amounts that were incorrect by a factor of 100 due to a Commerce error in formatting IJK's computer tape; and computer program's failure to apply the 20 percent difference in merchandise "cap" to IJK's transactions.

2. For Koyo Seiko, computer program's failure to correctly apply the best information available value intended by Commerce for the United States sales for which Koyo Seiko failed to provide cost of production data for matching home market sales.

3. For Nachi-Fujikoshi, failure to apply the ten percent minimum for general expenses and the eight percent minimum for profit when calculating constructed value.

4. For NSK, basing of pre-sale United States inland freight upon an incorrect price; exclusion of home market indirect selling expenses from home market indirect selling expenses variable; placement of consecutive plus signs in the string of variables used to determine United States direct selling expenses; treatment of NSK's inventory carrying costs and technical service expenses as direct selling expenses rather than indirect selling expenses; failure to convert pre-sale inland freight for purchase price sales from yen to dollars, exclusion of the word "not" from a sentence found on 57 Fed. Reg. 28418 in Commerce's *Federal Register* notice (which sentence should read, "However, we agree with Torrington that NSK's early payment discounts or distributor incentives are *not* included as expenses in its COP data."); and computer program's failure to apply the 20 percent difference in merchandise "cap" to NSK's transactions.

5. For NTN, failure to convert the price variable used to calculate the level of trade adjustments from yen to dollars; and computer program's failure to apply the ten percent minimum to general, selling and administrative expenses used to calculate constructed value.

E. *Sweden:*

1. For SKF Sweden, treatment of some selling expenses as if they were reported in Swedish Kronors when they were actually reported in Deutsche Marks; and treatment of warranty and technical service expenses as both indirect and direct expenses.

F. *United Kingdom:*

1. For Barden Corp., addition of the United Kingdom value-added tax percentage to United States and home market prices rather than multiplification [sic] of the United States price by the amount of the tax percentage and then addition of the result to both United States and home market prices.

2. For FAG U.K., addition of the United Kingdom value-added tax percentage to United States and home market prices rather

than multiplification [sic] of the United States price by the amount of the tax percentage and then addition of the result to both United States and home market prices; failure to apply the 20 percent difference in merchandise "cap" to the margin analysis; and failure to deduct commissions from United States price.

3. For SKF U.K., double-counting of movement expenses; treatment of warranty and technical service expenses as both indirect and direct expenses; subtraction of SKF U.K.'s "other discounts" twice from United States price; and addition of the United Kingdom value-added tax percentage to United States and home market prices rather than multiplification [sic] of the United States price by the amount of the tax percentage and then addition of the result to both United States and home market prices.

II. Cylindrical Roller Bearings

A. *Japan:*

1. For NSK, exclusion of home market indirect selling expenses from the home market indirect selling expenses variable; placement of consecutive plus signs in the string of variables added to determine United States direct selling expenses; treatment of inventory carrying costs and technical service expenses as direct selling expenses rather than indirect selling expenses; and computer program's failure to apply the 20 percent difference in merchandise "cap" to NSK's transactions.

Defendant's Proposed Order at 2–5.

Discussion

The Court's jurisdiction over this matter is derived from 28 U.S.C. § 1581(C) (1988).

This Court has stated "that fair and accurate determinations are fundamental to the proper administration of our dumping laws" and that "courts have uniformly authorized the correction of any clerical errors which would effect the accuracy of a determination." *Koyo Seiko Co. v. United States,* 14 CIT ____, ____, 746 F. Supp. 1108, 1110 (1990); *see, e.g., Daewoo Elecs. Co. v. United States,* 13 CIT 253, 279–80, 712 F. Supp. 931, 954 (1989); *Asociacion Colombiana de Exportadores v. United States,* 13 CIT 13, 28, 704 F. Supp. 1114, 1126 (1989); *Serampore Indus. Pvt. Ltd. v. United States Dep't of Commerce,* 12 CIT 825, 834, 696 F. Supp. 665, 673 (1988); *Gilmore Steel Corp. v. United States,* 7 CIT 219, 223–24, 585 F. Supp. 670, 674 (1984); *Atlantic Sugar, Ltd. v. United States,* 1 CIT 211, 511 F. Supp. 819 (1981).

Congress provided the ITA with authority to correct ministerial errors in the final results of administrative reviews in 19 U.S.C. § 1675(f) which states:

> The administering authority shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section. Such procedures shall ensure opportunity for interested parties to present their views regarding any such errors. As used in this

> subsection, the term "ministerial error" includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.

Congress explained its rationale for granting the ITA authority to correct ministerial errors after the publication of final results in administrative reviews, stating:

> It has come to the Committee's attention that certain final determinations contain clerical and other errors which are not corrected, under current procedures, unless the parties to the proceedings resort to judicial review of the final determination. *The result is expensive litigation that unnecessarily burdens the court system, in order to correct essentially unintended errors.* Therefore, the Committee has adopted this provision to allow for the correction of ministerial errors in final determinations within a limited time period after their issuance.

H.R. Rep. 100–40, 100th Cong., 1st Sess., pt. 1, at 144 (1987) (emphasis added).

ITA has promulgated regulations to implement Congress' mandate to correct ministerial errors which state in pertinent part:

> **§ 353.28 Procedures for the correction of ministrial errors.**
>
> (a) *In general.* The Secretary will disclose the calculations performed in * * * a final results of an administrative review of an antidumping duty order pursuant to § 353.22, to any party to the proceeding making a request in accordance with this section. A party to the proceeding must file such a request in writing with the Secretary within five business days of the date of publication of the relevant * * * final results of administrative review. A party to whom the Secretary has disclosed final calculations may submit comments concerning any ministerial errors in such calculations.
>
> (b) *Time limits.* Comments must be filed within five business days after the date of disclosure * * *. Interested parties may file replies to any comments submitted under paragraph (a) of this section. * * *
>
> (c) *Corrections.* The Secretary will analyze any comments received and, if appropriate, correct any ministerial errors by amending the * * * final results of administrative review.

19 C.F.R. § 353.28.

However, the filing of a summons with this court challenging the final results of an administrative review vests this court with exclusive jurisdiction over the challenged administrative review. *Zenith Elecs. Corp. v. United States,* 884 F.2d 556, 561 (Fed. Cir. 1989). Therefore, when a party, as here, files a summons challenging the final results of an administrative review before the ITA has an opportunity to correct ministerial errors in those final results, the ITA must obtain this courts permission to make such corrections and to publish amended final results. *Id.*

In this action, the ITA has followed its procedures for correcting ministerial errors by disclosing its calculations to all interested parties who requested access, accepting comments on alleged ministerial errors and analyzing these comments to determine what, if any, ministerial errors exist. The Court believes that the necessary corrections have already been prepared and ITA only needs this Court's permission to implement them and publish amended final results for the administrative reviews challenged here.

Federal-Mogul argues that the ITA has not sufficiently described the alleged ministerial errors or explained exactly how the ITA proposes to fix those errors. Federal-Mogul also argues that it was not provided sufficient time, pursuant to the ITA's regulations, to thoroughly analyze these Final Results for possible ministerial errors. As a result, the ITA's current motion may be one-sided. Finally, Federal-Mogul argues that the parties do not currently have access to the business proprietary version of the administrative record and 80 cannot fully respond to the ITA's motion. *Federal-Mogul's Response* at 2–5.

Torrington agrees with Federal-Mogul's arguments. *Torrington's Opposition* at 2–3. Further, Torrington disagrees with the ITA that each of the alleged ministerial errors cited by the ITA for correction are in fact ministerial errors. *Id.* at 3–5.

Federal-Mogul and Torrington's arguments miss the point. The ITA's goal in conducting an administrative review is to calculate dumping margins as accurately as possible. Federal-Mogul and Torrington had a full opportunity to review and comment on any ministerial errors in the ITA's Final Results pursuant to 19 C.F.R. § 353.28. If certain parties had not filed summonses so rapidly after the publication of the Final Results in these reviews, there is no doubt that the ITA would have proceeded to make the corrections which it is now seeking the Court's permission to make. There also seems to be little dispute that most of the corrections the ITA wishes to make are indeed ministerial errors which deserve correction.

It is clear that time and effort will be saved if the subject of the judicial challenges now before this Court are what the ITA considers to be the true and accurate final results from the second administrative reviews. Also, allowing the corrections may eliminate many of the issues raised in many of the complaints which have been filed with this Court challenging these Final Results. Allowing all parties in these actions freedom to file amended pleadings to take into account any changes made in the Final Results will prevent prejudice to any party and expedite resolution of these actions.

As for FAG's request that this Court order the ITA to correct an alleged ministerial error regarding FAG Cuscinetti SpA's home market inventory carrying costs, which is not included in defendant's motion, the ITA is instructed to determine if the alleged error is in fact a ministerial error which should be corrected. If the ITA determines that this is a ministerial error which should be corrected, the ITA is instructed to cor-

rect it. FAG has already raised this issue in its complaint and can maintain its challenge on this issue in any amended pleadings which FAG may file if the ITA determines that the alleged error should not be corrected. *See FAG Kugelfischer Georg Schafer KGaA v. United States*, Court No. 9207–00487 (Complaint of FAG Kugelfischer Georg Schafer KGaA, FAG Cuscinetti SpA, FAG (UK) Limited, Barden Corporation (UK) Limited, FAG Bearings Corporation and The Barden Corporation, Count II, para. 15) (August 21, 1992).

Therefore, this Court grants the ITA leave to correct the ministerial errors listed above and to publish amended final results incorporating these corrections. All parties to these actions are granted leave to file amended pleadings pursuant to Rule 15 of the Rules of this Court to take into account any changes in the Final Results which result from this opinion.

SCHEDULE

Plaintiff	*Court No.*
Federal-Mogul Corp.	92–06–00422
NTN Bearing Corp. of America	92–06–00423
Nippon Pillow Block Sales Co.	92–07–00455
NSK Ltd.	92–07–00470
Yamaha Motor Co.	92–07–00471
Emerson Power Transmission Corp.	92–07–00480
The Torrington Co.	92–07–00483
Inoue Jikuuke Kogyo Co., Ltd.	92–07–00484
Peer Bearing Co.	92–07–00485
Pratt & Whitney Canada Inc.	92–07–00486
FAG Kugelfischer Georg Schafer KGaA	92–07–00487
The Torrington Co.	92–07–00488
The Torrington Co.	92–07–00489
The Torrington Co.	92–07–00490
The Torrington Co.	92–07–00491
The Torrington Co.	92–07–00492
The Torrington Co.	92–07–00493
The Torrington Co.	92–07–00494
The Torrington Co.	92–07–00501
Nachi-Fujikoshi Corp.	92–07–00502
RHP Bearings	92–07–00503
Caterpillar Inc.	92–07–00504
Koyo Seiko Co.	92–07–00505
Federal-Mogul Corp.	92–07–00506
Federal-Mogul Corp.	92–07–00507
Federal-Mogul Corp.	92–07–00508
Federal-Mogul Corp.	92–07–00509
SKF USA, Inc.	92–07–00513
SKF USA, Inc.	92–07–00514
SKF USA, Inc.	92–07–00515
SKF USA, Inc.	92–07–00516
SKF USA, Inc.	92–07–00517
Federal-Mogul Corp.	92–07–00518
Federal-Mogul Corp.	92–07–00519
Societe Nouvelle de Roulements	92–07–00520
INA Walzlager Schaeffler KG	92–07–00522

(Slip Op. 92–207)

ST. PAUL FIRE & MARINE INSURANCE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85–04–00628

Plaintiff moves pursuant to Rule 59 of the Rules of this Court for rehearing and reconsideration of *Saint Paul Fire & Marine Ins. Co. v. United States*, 16 CIT ___, Slip Op. 92–119 (July 27, 1992), which denied plaintiff's motion to amend its complaint to add causes of action which came to light during discovery.

Held: A motion for rehearing and reconsideration will not be granted unless the Court's original decision is "manifestly erroneous." plaintiff has made no showing that this is the case here.

[Plaintiff's motion for rehearing and reconsideration denied.]

(Dated November 25, 1992)

Sandler, Travis & Rosenberg, P.A. (*Edward M. Joffe, Joanne Sargent, Gilbert Lee Sandler, Beth C. Ring* and *Arthur K. Purcell*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Susan Burnett Mansfield*) for defendant.

OPINION

TSOUCALAS, *Judge:* Plaintiff moves, pursuant to Rule 59 of the Rules of this Court,[1] for rehearing and reconsideration of *Saint Paul Fire & Marine Ins. Co. v. United States*, 16 CIT ___, Slip Op. 92–119 (July 27, 1992), which denied plaintiff's motion to amend its original complaint to include additional claims which allegedly came to light during discovery. Defendant opposes plaintiff's motion for rehearing and reconsideration.

The procedural background of this case may be found in *Saint Paul*, 16 CIT ___, Slip Op. 92–119.

DISCUSSION

The decision to grant or deny a motion for rehearing lies within the sound discretion of the court. *Sharp Elecs. Corp. v. United States*, 14 CIT ___, ___, 729 F. Supp. 1354, 1355 (1990); *V.G. Nahrgang Co. v. United States*, 6 CIT 210, 211 (1983). In ruling on a motion for rehearing, a court's previous decision will not be disturbed unless it is "manifestly erroneous." *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 337, 601 F. Supp. 212, 214 (1984). This Court has clearly stated that:

> A rehearing may be proper when there has been some error or irregularity in the trial, a serious evidentiary flaw, a discovery of im-

[1] Rule 59 of the Rules of this Court states in pertinent part:

(a) GROUNDS.

A new trial or rehearing may be granted to all or any of the parties and on all or part of the issues * * * (2) in an action tried without a jury or in an action finally determined, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States.

> portant new evidence which was not available, even to the diligent party, at the time of the trial, or an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which severely impaired a party's ability to adequately present its case. In short, a rehearing is a method of rectifying a significant flaw in the conduct of the original proceeding.

W.J. Byrnes & Co. v. United States, 68 Cust. Ct. 358, C.R.D. 72–5 (1972).

Plaintiff argues that this Court, in denying the plaintiff leave to amend, based its finding on two determinations – that there was undue delay in filing the motion for leave to amend and that this undue delay would cause unfair prejudice to the defendant – neither of which is "warranted by the record." *Brief in Support of a Motion for Rehearing and Reconsideration* ("*Plaintiff's Brief*") at 7.

This Court recognizes now, as it did in Slip Op. 92–119, that Rule 15(a) mandates that leave to amend "shall be freely given when justice so requires." USCIT R. 15(a) (1988). *Saint Paul,* 16 CIT at ____, Slip Op. 92–119 at 5. This Court also recognizes that "this mandate is to be heeded" and leave to amend should "be 'freely given.'" *Foman v. Davis,* 371 U.S. 178, 182 (1962).

However, plaintiff ignores the requirement that Rule 15(a)'s mandate to freely allow amendment must be balanced against the numerous considerations which protect the rights of the opposing party. *Id.* This Court applied the required balancing to the facts presented to it in deciding *Saint Paul,* 16 CIT ____, Slip Op. 92–119.

Plaintiff's arguments place undue emphasis upon the legal standards applied to a motion for leave to amend, instead of focusing on the standards applicable to a motion for a rehearing. It is not necessary at this point to repeat this Court's rationale in deciding plaintiff's motion to amend as the purpose of a rehearing is not to retry a case." *BMT Commodity Corp. v. United States,* 11 CIT 854, 855, 674 F. Supp. 868, 869 (1987).

In addition, plaintiff's factual support for its motion for rehearing and reconsideration is based upon the timing of its receipt of certain documents and information from the U.S. Customs Service ("Customs"), including-portions of a report of an audit of Opera Garment Inc. ("Opera") conducted by Customs. Plaintiff first requested these documents under the Freedom of Information Act ("FOIA") on November 28, 1984. *Plaintiff's Brief* at 2. Responding to plaintiff's request, on March 27, 1985 Customs provided certain records relating to the investigation of Opera, and denied others. Among the records which plaintiff received were relevant portions of the audit report which

> disclosed that Opera's procedures for controlling and accounting for material were inadequate to support entry of merchandise under the partially duty free provisions of item 806.20 of the Tariff Schedules of the United States (articles returned to the U.S. after having been exported for repairs or alterations). As a result, we believe that for the period September 1, 1979, through August 31, 1980, Opera undervalued imported merchandise by approximately

> $11,975,500 with a duty loss to Customs of approximately $960,100.

Regulatory Audit Division, U.S. Customs Service, 1–81–CEO–011, Consumption Entry Audit Report Opera Leather Garment Ltd. September 28, 1981 at 1.

Plaintiff states that "had [all of] the reports [requested through FOIA] been made available prior to April 1985, plaintiff would have denied liability, not paid the assessments and raised its legal defenses in a collection action." *Plaintiff's Brief* at 7.

However, this Court finds that the information received by the plaintiff prior to the commencement of this action (*i.e.,* the portions of the audit report) clearly should have placed plaintiff on notice that Customs had serious questions about Opera's business practices with respect to the importation of the type of goods at issue in this action. As a party to an action contesting Customs' denial of 806.20 treatment for Opera's entries, plaintiff should have begun investigating the merits of the information provided through the FOIA request. Plaintiff did not do so. Instead, plaintiff would have this Court believe that plaintiff was not put on notice of Customs' problems with Opera's imports until the plaintiff received the defendant's reply to plaintiff's discovery requests in September 1987.

Plaintiff now argues, *for the first time,* that it was justified in not including these issues in its original complaint and in taking thirteen months to file its motion to amend by stating that it did not know it needed to amend its complaint until receipt of the discovery. In regard to the thirteen month delay, plaintiff argues that such a drastic change of strategy required in depth research as well as lengthy negotiations between counsel and plaintiff on whether to proceed with this action. *Plaintiff's Brief* at 4–5, 9.

These arguments are rejected by this Court because plaintiff presents no explanation why these arguments could not have been presented when plaintiff originally moved for leave to amend its complaint. *BMT Commodity Corp.,* 11 CIT at 855, 674 F. Supp. at 869; *V.G. Nahrgang Co.,* 6 CIT at 213 n.3. Also, as noted above, plaintiff was put on notice of Customs' concerns regarding Opera's imports upon receipt of the audit report on March 27, 1985 and failed to act on it.

Therefore, this Court denies plaintiff's motion for rehearing and reconsideration of *Saint Paul,* 16 CIT ____, Slip Op. 92–119 because plaintiff has failed to demonstrate that the Court's prior decision was "manifestly erroneous" or that other circumstances warrant rehearing and reconsideration.

(Slip Op. 92–208)

DAIDO CORP., DAIDO KOGYO CO., LTD., AND ENUMA CHAIN MANUFACTURING CO., LTD., PLAINTIFFS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, BARBARA H. FRANKLIN, SECRETARY OF COMMERCE, TIMOTHY J. HAUSER, ACTING UNDERSECRETARY OF COMMERCE FOR INTERNATIONAL TRADE, AND ALAN DUNN, ASSISTANT SECRETARY OF COMMERCE FOR IMPORT ADMINISTRATION, DEFENDANTS, AND AMERICAN CHAIN ASSOCIATION, INTERVENOR-DEFENDANT

Court No. 92–07–00429

OPINION AND ORDER

[Plaintiffs' motion to compel disclosure and application for injunctive relief each denied in part and granted in part.]

(Dated November 25, 1992)

Tanaka Ritger & Middleton (*Patrick F. O'Leary*) for the plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeffrey M. Telep*) Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Patrick Gallagher*), of counsel, for the defendants.

Covington & Burling (*David E. McGiffert* and *David R. Grace*) for the intervenor-defendant.

AQUILINO, *Judge:* The background of this action, commenced by the plaintiffs for extraordinary equitable relief, is set forth in the court's Slip Op. 92–129, 16 CIT ___, 796 F.Supp. 533 (1992), familiarity with which is presumed. As stated therein, the action has its genesis in the Treasury Department's finding of dumping *sub nom. Roller Chain, Other Than Bicycle, From Japan,* 38 Fed. Reg. 9,926 (April 12, 1973), and plaintiffs' subsequent, continuing efforts to obtain revocation of this finding before the International Trade Administration, U.S. Department of Commerce ("ITA").

According to *Roller Chain, Other Than Bicycle, From Japan; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part,* 56 Fed. Reg. 50,092 (Oct. 3, 1991), the ITA decided not to effectuate a 1977 determination by Treasury to revoke as against the plaintiffs, pending conduct of a review of the period April 1, 1990 to March 31, 1991 pursuant to 19 U.S.C. § 1675. However, on May 22, 1992 the ITA

> notified plaintiffs that there would be a delay in the 1990–91 review due to lack of funding [and f]urther * * * announced initiation of a new administrative review for the April 1, 1991–March 31, 1992 period * * * requested by the American Chain Association * * *. Consequently, * * * Commerce sent plaintiffs a 1991–92 review questionnaire with a response deadline of July 6, 1992. Plaintiffs' request * * * for deferral of the questionnaire responses pending completion of the 1990–91 review and finalization of the revocation was rejected by Commerce * * *.

16 CIT at ____, 796 F.Supp. at 535. This action ensued, with plaintiffs' seeking relief by way of a temporary restraining order, preliminary injunction and/or writ of mandamus.

Among other things in Slip Op. 92–129, the court concluded that there is no dispute as to jurisdiction pursuant to 28 U.S.C. § 1581(i)(4). 16 CIT at ____, 796 F.Supp. at 536. Also, defendants'

> long-standing disregard for statutory deadlines in administrative reviews has repeatedly been judicially condemned and required judicial intervention. * * * Here, plaintiffs' urgent need for a writ of mandamus has to a large extent been obviated by Commerce's commitment to plaintiffs and to the court at the hearing on July 8, 1992 to make the necessary allocation of funding to the 1990–91 review and adhere to the following timetable: September 1, 1992 for the preliminary results; November 15, 1992 for the final results. * * * Plaintiffs have accepted the foregoing timetable. Consequently, imposition of the extraordinary remedy of mandamus is deemed unwarranted at this time. However, the court will accede to plaintiffs' request to retain jurisdiction in this case and plaintiffs' application for mandamus will be held in abeyance pending the outcome of Commerce's conformance to the stipulated deadlines for issuing the preliminary and final results of the review.

Id. (citations omitted).

As for plaintiffs' application for a preliminary injunction against ITA conduct of an administrative review for 1991–92 before final determination of whether or not to revoke based on the review results for the preceding year, the court denied the relief requested, albeit on condition that,

> should plaintiffs claim during the pendency of this action that the alleged threat of retaliatory refusal to revoke for failure to answer the questionnaires by the extended deadline has materialized in the course of the 1990–91 review, this court will reconsider plaintiffs' requested injunctive and mandamus relief for such retaliation.

16 CIT at ____, 796 F.Supp. at 538.

I

Since issuance of Slip Op. 92–129, the ITA has published *Roller Chain, Other Than Bicycle, From Japan; Preliminary Results of Antidumping Finding Administrative Review*, 57 Fed.Reg. 41,471, 41,472 (Sept. 10, 1992), finding weighted-average margins for 1990–91 of 0.02 percent for Daido Kogyo and 0.00 for Enuma and reciting that it had been the agency's

> original intention to revoke the finding with respect to Daido and Enuma subsequent to completion of the administrative review of the 1986–1987 period. * * * However, in *Freeport Minerals Co. v. United States*, 776 F.2d 1029 (Fed. Cir., 1985), the Court * * * emphasized the need to base revocation determinations on "current data", and held that such determinations should not be based on information more than three years old. By the time the final results of

> the 1986–1987 review were published * * *, the data on which the tentative revocation would be based were more than four years old. Accordingly, we concluded at that time that we would conduct a review of a more recent period before deciding whether to revoke the finding with respect to these two companies.

Notwithstanding this stated, original intention, plus written company commitments to an immediate suspension of liquidation and reinstatement of the finding of dumping should sales at less than fair value resume, the ITA went on to report:

> * * * [B]ecause of confidential information in our possession, we are unable to make a determination at this time that sales at less than fair value will not occur in the future. Therefore, we will not consider revocation at this time.

Id., 57 Fed.Reg. at 41,473.

The plaintiffs have returned to court with a motion for release of the confidential information referred to, complaining that "this hurdle seems insurmountable because the ITA has consistently rebuffed [their] efforts to gain access to this so-called 'confidential' information."[1] In addition, they have returned with a renewed application for a temporary restraining order and preliminary injunction, posturing that the ITA "has done almost everything imaginable to prevent [them] from getting a fair shot at revocation.[2]

Though plaintiffs' papers are replete with such hyperbole, the court discerned enough in them to warrant issuance of an order restraining the defendants temporarily from taking any further steps on administrative review of either 1990–91 or 1991–92 and also directing the government to show cause why it should not be enjoined preliminarily (1) from issuing a final determination for 1990–91 "until [p]laintiffs have the opportunity to challenge, through the briefing and hearing process, the so-called 'confidential' information" and (2) from requiring responses to questionnaires issued for 1991–92. A hearing has since been held in open court on these issues.

II

Attached to a case brief submitted by the American Chain Association to the ITA in conjunction with administrative review of 1986–87 was a document apparently written months earlier by an unnamed individual and received by its attorneys concerning questionnaire responses filed by respondents Daido *et al.* Counsel's transmittal represented the information to be

> highly sensitive in nature, and its disclosure could * * * prove deleterious should the Commerce Department decide to inquire further into the matter. * * * [P]ublic disclosure at this juncture could

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[1] Memorandum in Support of Plaintiffs' Motion for Release of Confidential Information, p. 2 (footnote omitted). This motion was accompanied by a motion to amend plaintiffs' complaint, essentially to assert jurisdiction pursuant to 28 U.S.C. § 1581(f). That motion is hereby granted.

[2] Memorandum of Law in Support of Plaintiffs' Application for Temporary Restraining Order and Preliminary Injunction [hereinafter referred to as "Plaintiffs' Nov. 5 Memorandum"], pp. 1–2 (Nov. 5, 1992).

> needlessly prejudice and/or embarrass Daido Kogyo, Enuma Chain, and Daido Corporation (U.S.A.). In light * * * of these considerations, the ACA submits that the information qualifies for confidential treatment under 19 C.F.R. § 353.32(a).
>
> * * * In view of the * * * Commerce Department's policy interest in encouraging knowledgeable parties to come forward in antidumping proceedings, information that could be used to identify the author of the letter deserves the strictest protection. We therefore request that this information be exempt from release under Administrative Protective Order.[3]

The agency acquiesced in this request, deciding not to release the information on grounds that it has authority to exempt from disclosure matter of a type for which there is a clear and compelling need to withhold, citing 19 C.F.R. §§ 353.33 and 353.34(a), and that the information sought "is in fact of such a highly sensitive nature that it clearly should not be released."[4] The government continues to oppose discovery, contending now that the information the plaintiffs seek should be protected "pursuant to the informant's privilege, the investigative files privilege, and because of a clear and compelling need to prevent disclosure."[5]

A

The Trade Agreements Act of 1979, as amended, provides for disclosure under protective order of confidential information submitted to the ITA, in general, as follows:

> Upon receipt of an application * * *, the administering authority * * * shall make all business proprietary information presented to, or obtained by it, during a proceeding (except privileged information, classified information, and specific information of a type for which there is a clear and compelling need to withhold from disclosure) available to interested parties who are parties to the proceeding under a protective order * * * regardless of when the information is submitted during a proceeding. * * *

19 U.S.C. § 1677f(c)(1)(A).

After the plaintiffs had become formal parties to the proceedings for administrative review of the year April 1, 1990–March 31, 1991, counsel for the American Chain Association resubmitted the informer's document. Upon release of the preliminary results of that review, quoted in part I above, plaintiffs' attorney demanded disclosure of "the 'confidential information' which has caused the ITA to not consider the Companies' request for revocation", arguing that it had become the "pivotal fact" in denial of revocation.[6] The agency's response apparently was to

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[3] Attachment 2 to Affidavit of Patrick F. O'Leary, p. 2 (Letter from David R. Grace to Secretary of Commerce (June 28, 1991)).

[4] Attachment 5 to Affidavit of Patrick F. O'Leary, p. 2 (July 5, 1991) (footnote omitted).

[5] Defendants' Memorandum in Opposition to Plaintiffs' Motion for Release of Confidential Information, p. 2 (footnote omitted).

[6] Attachment 23 to Affidavit of Patrick F. O'Leary, p. 2 (Sept. 3, 1992).

notify counsel that it would grant his "APO request" but not to the extent of producing the information.[7]

On the question of privilege attaching to a government informer, traditional teaching has been to the effect that the

> privilege applies only to the *identity* of the informer, and not to his communication as such. Of course, if disclosure of the contents of his statement would tend to disclose the identity of the informer, the communication itself should come within the privilege, but solely to the extent necessary to preserve the informer's anonymity.

VIII Wigmore on Evidence § 2374, at 765 (NcNaughton rev. 1961) (emphasis in original; footnotes omitted). In *Roviaro v. United States*, 353 U.S. 53, 59–61, 62 (1957), the Supreme Court discussed the phenomenon in the following manner:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. * * * The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.
>
> The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.
>
> A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. * * *
>
> * * * * * * *
>
> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of

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[7] *See* Attachment 27 to Affidavit of Patrick F. O'Leary.

The plaintiffs then filed their motion with the court to compel disclosure. The defendants prepared public and confidential versions of their response to this motion, the latter of which has attached allegedly-privileged documents, including that of the informer. Apparently, that version was inadvertently served on plaintiffs' counsel, as well as filed with the court. Allegedly believing he was under "no obligation not to look at the 'confidential' document [, a]ccordingly, the] reviewed" it. Affidavit of Patrick F. O'Leary, para. 39. When defendants' attorneys discovered the mistake and demanded return of their confidential memorandum in opposition, Mr. O'Leary complied upon a representation that he had not disclosed the contested information to his clients. *See id.*, para. 40 and attachment 30 thereto.

> each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.[8]

Roviaro was a criminal case, but an informer's identity can be privileged in civil matters. *See generally* Developments in the Law, *Privileged Communications,* 98 Harv. L. Rev. 1450 (1985), and cases cited therein. Indeed, some courts have concluded that the privilege is stronger in civil cases, while others have applied the same standard to both kinds of actions. *Compare, e.g., In re United States,* 565 F.2d 19, 22 (2d Cir. 1977), *cert. denied sub nom. Bell v. Socialist Workers Party,* 436 U.S. 962 (1978), *with Hodgson v. Charles Martin Inspectors of Petroleum, Inc.,* 459 F.2d 303, 305 & n. 2 (5th Cir. 1972). Whatever the approach, this Court of International Trade clearly has jurisdiction to enforce it in an action such as this. *See* 19 U.S.C. § 1677f(c)(2); 28 U.S.C. § 1581(f) and § 2641(b).

Generally, as the nature of the asserted privilege implies, an informer is in privity with law-enforcement officer(s). But that is not the scenario at bar. Rather, the tipster sent its document to counsel for the American Chain Association as well as to other persons. There was no delivery to the government, nor is an expectation of such transmittal readily apparent from the document itself. On the other hand, given the Association's direct involvement in the administrative proceedings, it cannot be said that what ultimately happened, to wit, forwarding to the ITA followed by substantive reaction, was out of the question. In short, the court cannot conclude in light of this involvement that lack of privity between informer and government prevents the latter from now asserting its privilege. *Cf. Martin v. Albany Business Journal, Inc.,* 780 F.Supp. 927 (N.D.N.Y. 1992); McCormick on Evidence § 111, at 408 (4th ed. 1992).

Regarding the delivery of the confidential version of defendants' memorandum to opposing counsel, the

> traditional judicial approach places the risk of inadvertent disclosure on the holder of the privilege. Under this approach, any disclosure, whether intentional or not, is deemed a waiver.

98 Harv. L. Rev. at 1660, citing *In re Grand Jury Investigation of Ocean Transp.,* 604 F.2d 672, 675 (D.C.Cir.), *cert. denied sub nom. Sea-Land Service, Inc. v. United States,* 444 U.S. 915 (1979); *United States v. Kelsey-Hayes Wheel Co.,* 15 F.R.D. 461, 465 (E.D. Mich. 1954); VIII Wigmore on Evidence § 2325, at 633. But not all courts have followed this approach. In *Mendenhall v. Barber-Greene Co.,* 531 F.Supp. 951, 955 n. 8 (N.D. Ill. 1982), for example, the court characterized it as "atavistic, generating (in much the same way as a flawed pleading in the era of common law pleading) harsh results out of all proportion to the mistake of inadvertent disclosure."

There is no indication that the occurrence herein was anything other than a mistake. Moreover, since the informer privilege aims to protect

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[8] Footnotes omitted.

identity, which is not directly stated on the documents appended to defendants' confidential memorandum, and since their contents apparently did not go beyond counsel to someone possibly better able to discern that identity, the court cannot conclude that effective waiver of the protection of the critical fact has taken place. *Cf.* 2 Weinstein's Evidence para. 510–[04], at 510–26 (1992) ("once the identity of the informer is disclosed 'to those who would have cause to resent the communication' no further reason remains for applying the privilege"), citing *Roviaro, supra.*

That the reason for applying the privilege remains intact, however, is not an automatic basis for denial of any and all discovery. Clearly, the informer's document at bar contains references tending to reveal identity, the nature of which could cause the type of emotion sought to be avoided. Therefore, those references should not be disclosed, but, on the other hand, the court is not persuaded that other information therein is so inextricably intertwined with its source's identity as to protect it from formal revelation to plaintiffs' counsel in the pursuit of their interests.

B

The government, in the pursuit of its interests, has apparently started investigation of the references in the informer's document which is beyond the scope of the ITA proceedings. This activity, in turn, has begun to generate documents of its own, including those inadvertently delivered to plaintiffs' counsel. The defendants attempt now to cloak all of the confidential information with investigatory privilege. To properly do so,

> (1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege.

In re Sealed Case, 856 F.2d 268, 271 (D.C.Cir. 1988), citing *Black v. Sheraton Corp. of America,* 564 F.2d 531, 542–43 (D.C.Cir. 1977), and *Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d 1336, 1341–42 (D.C.Cir. 1984).

The court has reviewed confidential affidavit(s) submitted on behalf of the government and finds its attempted assertion in compliance with the foregoing standards. Hence, the court must balance the public interest in nondisclosure against plaintiffs' need for access to the privileged information. In *Black,* the court stated that "[j]udicial recognition of an executive privilege depends upon 'a weighing of the public interests that would be served by disclosure in a particular case.'" 564 F.2d at 545, quoting *Nixon v. Sirica,* 487 F.2d 700, 716 (D.C. Cir. 1973). The factors to be considered in such an analysis were set forth at length in *Friedman,* 738 F. 2d at 1342–43, quoting *Frankenhauser v. Rizzo,* 59 F.R.D. 339, 344 (E.D.Pa. 1973), to wit:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed: (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources: and (10) the importance of the information sought to the plaintiff's case.

At this seemingly-early moment of investigation, the plaintiffs have not (and probably could not have) tipped the scale on these factors in their favor. Hence, defendants' asserted privilege must stand, at least for now. However, this particular privilege does not protect from discovery the informer's document, which from the beginning has been in the hands of others and which is at the heart of the ITA's current proceedings.

C

Nonetheless, the defendants take the position that there is a clear and compelling need within the meaning of 19 U.S.C. § 1677f(c)(1)(A), *supra,* to withhold its disclosure.

When the agency attempts to rely on this provision, the court will consider the matter *de novo* to determine whether such a need in fact exists. *E.g., Bethlehem Steel Corp. v. United States,* 13 CIT 617, 618, 718 F.Supp. 70, 71 (1989): *D & L Supply Co. v. United States,* 12 CIT 732, 734, 693 F.Supp. 1179, 1181 (1988). And in rendering a decision, the court must balance the interests of the government in preventing disclosure with those of the party demanding access. In this instance, the agency has indicated, at least preliminarily, that the document in question is the linchpin of its determination not to revoke. As long as this is the case, to preclude opposing counsel from formal knowledge of any of its contents clearly would tend to foreclose the kind of meaningful opportunity to participate contemplated by the Trade Agreements Act of 1979, as amended.

Indeed, it has been held that the fact that information is confidential is insufficient on its own to prove clear and compelling need to withhold it from disclosure. *E.g., Allied Tube & Conduit Corp. v. United States,* 13 CIT 698, 706, 721 F.Supp. 305, 312 (1989), *aff'd,* 898 F.2d 780 (Fed.Cir. 1990). Where there exist adequate safeguards to prevent such information from passing beyond the eyes for which access is appropriate, the

> mere possibility that information could be inadvertently disclosed under an APO is not enough to overcome the statutory policy favor-

ing disclosure. Moreover, the imposition of sanctions for even inadvertent disclosures militates against this possibility.

Komatsu Forklift Manufacturing Co. v. United States, 13 CIT 578, 582–83, 717 F.Supp. 843, 846 (1989) (citation omitted). Furthermore, the fear that the information provided to an attorney might find its way to the client is not enough to prevent disclosure, although other cases have considered the possible chilling effect court-ordered disclosure might have on future investigations. *E.g., American Brass v. United States*, 12 CIT 1068, 1073, 699 F.Supp. 934, 938 (1988). In sum, while the government has a clear interest in protecting sources in order to encourage others to come forth with information, that interest cannot be equated automatically with a compelling need to withhold, which appears to be the attempt here.

III

Plaintiffs' application (and existing temporary restraining order) are aimed not only at the ITA's administrative review of the period April 1, 1990 to March 31, 1991 but also at April 1, 1991 to March 31, 1992, initiation of which was noticed on May 22, 1992, 57 Fed.Reg. 21,769. Apparently, agency questionnaires for that later year issued the same day to the plaintiffs. Their counsel quickly requested that the "ITA withdraw the * * * questionnaires pending completion of the 1990–1991 review and finalization of the revocation"[9] upon the following representation:

> The sending of the 1991–1992 period questionnaires and requiring submission of answers thereto by July 6, 1992 creates additional and presumably unnecessary burdens on the Companies. If the 1990–1991 period final results are published and the dumping finding revoked this summer, the Companies will have expended considerable time and money unnecessarily answering questionnaires. As indicated above, the ITA has not seen fit in the past to require the Companies to answer questionnaires for periods not part of the process connected with the pending finalization of the revocation. Moreover, the above quoted comments from the 1986–1987 period final results clearly emphasize that future investigations were to be limited to "a" – obviously meaning one – "review of a more recent period". That review can be completed as soon as the ITA resolves its money problems. In the interim, the Companies should not be burdened by the need to answer additional questionnaires.[10]

The ITA declined the request to withdraw but did extend its deadline two weeks until July 20, 1992, by which time this action already had been commenced. On September 10, 1992 the agency sent the plaintiffs a letter reminding them that Slip Op. 92–129, *supra*, had "not relieved * * * their responsibility to respond"[11] to the May 22 questionnaires.

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[9] Attachment 18 to Affidavit of Patrick F. O'Leary, p. 2 (May 27, 1992).

[10] *Id.*

[11] Attachment 26 to Affidavit of Patrick F. O'Leary.

Counsel then presented a request to extend their time to answer until January 15, 1993, whereupon the ITA reacted on September 22, 1992 that responses were due no later than the next day, September 23rd.

That deadline has passed without plaintiffs' compliance, with the indication that the agency will now resort to best information otherwise available within the meaning of 19 U.S.C. § 1677e(c) in carrying out its administrative review of 1991–92. This expectation has led counsel to now project that his clients will "get saddled with a BIA dumping margin for 1991–1992, which, in turn spawns an alternative basis for permanently denying revocation and grounds for mooting the 1990–1991 period lawsuit." Plaintiffs' Nov. 5 Memorandum, p. 8.

Plaintiffs' instant application sets forth a suggested schedule of events which proposes a deadline for answering the 1991–92 questionnaires, "if necessary", some 62 days after the deadline suggested for the final results of the review of the preceding year. Neither the defendants nor the intervenor-defendant have indicated any willingness to attempt to accommodate their adversaries' perceived predicament, which, as the court recognized in Slip Op. 92–129, clearly is not entirely of their own making.

Whatever the particular responsibilities, the defendants and intervenor-defendant oppose grant of any stay, which can only occur when an applicant therefore establishes a threat of immediate irreparable harm, the likelihood of success on the merits, that the public interest would be better served by issuing rather than by denying an injunction, and a balance of hardship in its favor. *E.g., S.J. Stile Associates Ltd. v. Snyder,* 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981); *Federal-Mogul Corporation v. United States,* 16 CIT ____, Slip Op. 92–161, at 3–4 (Sept. 23, 1992).

With regard to the requisite threat of immediate irreparable harm, the plaintiffs take the position that completion of the administrative review of 1991–92 before court consideration of the final determination as to the prior year has run its course could effectively preclude judicial relief of the kind they seek. They refer to *Zenith Radio Corporation v. United States,* 710 F.2d 806, 810 (Fed.Cir. 1983), wherein the court concluded

> that liquidation would * * * eliminate the only remedy available to Zenith for an incorrect review determination by depriving the trial court of the ability to assess dumping duties on Zenith's competitors in accordance with a correct margin on entries in the '79–80 review period. The result of liquidating the '79–'80 entries would not be economic only. * * * Zenith's statutory right to obtain judicial review of the determination would be without meaning for the only entries permanently affected by that determination. In the context of Congressional intent in passing the Trade Agreements Act of 1979 and the existing finding of injury to the industry underlying T.D. 71–76, we conclude that the consequences of liquidation do constitute irreparable injury.

While that case focused on the irrevocability of liquidation, its import reaches this action as well, to wit, in the absence of an injunction the plaintiffs could lose their statutory right to meaningful court review of ITA denial of revocation, which can have consequences extending years into the future. *Cf.* 19 C.F.R. § 353.25 (1992) (revocation permissible in the absence of dumping for a period of "at least three consecutive years"). Indeed, this court has held that time is an element of irreparability. *Bomont Industries v. United States,* 10 CIT 431, 437, 638 F.Supp. 1334, 1339 (1986).

The threat of immediate irreparable harm, as perceived by the plaintiffs, is based on application of best information otherwise available in the absence of questionnaire responses for 1991–92 which counsel predict could lead to dumping margins of 15.92 or 43.29 percent[12] in contrast to years heretofore reviewed when margins found to exist were *de minimis.* While the court abstains from any view at this time on the propriety of reliance on best information otherwise available for that year, it is constrained to conclude that that potential does amount, at a minimum, to a present threat of irreparable harm to the plaintiffs.[13]

Both the governing statute, 19 U.S.C. § 1675(c), and the above-cited regulation make clear that revocation is discretionary on the part of the ITA, even when the specified conditions exist. *Cf. Manufacturas Industriales de Nogales, S.A. v. United States,* 11 CIT 531, 666 F.Supp. 1562 (1987). Hence, a showing of likelihood of success on the merits in an action like this is more onerous. On the other side, the findings in Slip Op. 92–129 are hardly complimentary of the defendants on those controlling issues. Moreover, this and other courts have held that although the

> extraordinary remedy of a preliminary injunction is not available unless the moving party's burden of persuasion is met as to all four of the above factors, the showing of likelihood of success on the merits is in inverse proportion to the severity of the injury the moving party will sustain without injunctive relief.

Smith Corona Corp. v. United States, 11 CIT 954, 965, 678 F.Supp. 285, 293 (1987), quoting *Hyundai Pipe Co. v. U.S. Department of Commerce,* 11 CIT 238, 243 (1987), and citing *Ceramica Regiomontana, S.A. v. United States,* 7 CIT 390, 395, 590 F.Supp. 1260, 1264 (1984), and *American Air Parcel Forwarding Co. v. United States,* 1 CIT 293, 300, 515 F.Supp. 47, 53 (1981).

At this stage, that proportion favors the plaintiffs. Not only is this evident, but at the hearing the defendants had difficulty mustering reasons tending to support themselves on the remaining two requisites for

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[12] *See, e.g.,* Plaintiffs' Nov. 5 Memorandum, p. 7.

[13] In reaching this conclusion as for 1991–92, the court is unable to extend it to cover 1990–91. That is, denial of a stay of publication of a final determination for that year would not constitute harm of the degree indicated for 1991–92 in view of the alternative avenue for relief available to parties in plaintiffs' position under 19 U.S.C. § 1516a(a)(2), particularly if the subsequent administrative review is to be stayed. Then again, plaintiffs' having waited until September 1992 to formally request production of the informer's document may not have been considered untimely by the agency in granting them an administrative protective order on September 14th, but that timing hardly enhances their standing now to delay publication of the final determination for which this action was originally commenced.

injunctive relief. They could not show hardship if the court were to grant plaintiffs' application, nor did they even attempt to prove that the public interest would be better served by denial of the requested interim relief. This is no doubt the case because that interest is always the fair and efficient administration of U.S. trade laws, which is essentially what the plaintiffs have been pleading for. Furthermore, the first rule of practice of this Court of International Trade is to secure the just, speedy and inexpensive determination of every action.

IV

To summarize the foregoing, it is the decision of the court to grant plaintiffs' motion to compel disclosure to the extent that those portions of the informer's document which do not tend to indicate its identity will be available under protective order to counsel for the plaintiffs, and only to counsel, at or after 2 p.m. on November 30, 1992. The attorneys for the defendants and for the intervenor-defendant may appear in room 769 of the courthouse at 2 p.m. on that day to review the proposed redactions prior to release of the remainder of the document's contents. In all other respects, plaintiffs' motion to compel disclosure must be, and it hereby is, denied.

It is further the decision of the court to deny plaintiffs' application for a preliminary injunction in regard to the ITA's administrative review of the year April 1, 1990 to March 31, 1991, and it hereby is denied. And it is further the decision of the court to grant plaintiffs' application in regard to the agency's administrative review of the year April 1, 1991 to March 31, 1992: The defendants and their officers, employees, agents, servants, sureties and assigns are thus hereby enjoined from any further review of importation of roller chain, other than bicycle, from Japan during the period April 1, 1991 to March 31, 1992 pending completion of similar proceedings for the preceding year April 1, 1990 to March 31, 1991 and any judicial review of the result(s) thereof.

(Slip Op. 92–209)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS

Court No. 90–10–00548

Plaintiff moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record, claiming that the determination of the Department of Commerce, International Trade Administration ("Commerce"), was unsupported by substantial evidence on the record and not in accordance with law. Specifically, plaintiff claims that (1) Commerce improperly failed to collect interest on bonds which were posted to cover estimated dumping duties, (2) Commerce erred in using cost of production data submitted by Koyo, (3)

Commerce erred in using NSK's home market credit expenses that took account of so-called "compensating balances," and (4) Commerce committed programming errors in its final margin calculations.

Held: Plaintiff's motion is granted in part and this case is remanded to Commerce for correction of Commerce's computer programming errors. Furthermore, plaintiff's motion is denied in all other respects and Commerce's determination is affirmed thereto.

[Plaintiff's motion denied in part and granted in part and this case is remanded to the ITA.]

(Dated November 25, 1992)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., John M. Breen* and *Margaret E.O. Edozien*), of counsel: *Scott A. Scherff,* Managing Attorney, The Timken Company, for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); of counsel: *Joan L. MacKenzie,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Powell, Goldstein, Frazer & Murphy (*Peter O. Suchman, Susan P. Strommer* and *Niall P. Meagher*) for defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Donohue and Donohue (*Joseph F. Donohue, Jr.* and *Kathleen C. Inguaggiato*) for defendant-intervenors NSK Ltd. and NSK Corporation.

Opinion

Tsoucalas, *Judge:* Plaintiff, The Timken Company ("Timken"), moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record. This motion challenges the final determination of the Department of Commerce, International Trade Administration ("Commerce" or "ITA"), in *Tapered Roller Bearings Four Inches or Less in Outside Diameter and Certain Components Thereof From Japan; Final Results of Antidumping Duty Administrative Review* ("*Final Results*"), 55 Fed. Reg. 38,720 (1990).

Background

The determination subject to review in this case covers the period from August 1, 1986 through July 31, 1987 of the antidumping duty order issued by the Department of the Treasury in *Tapered Roller Bearings and Certain Components From Japan,* 41 Fed. Reg. 34,974 (1976) (T.D. 76–227). This administrative review was commenced on September 21, 1987. *Initiation of Antidumping and Countervailing Duty Administrative Reviews; France et al.,* 52 Fed. Reg. 35,466–67 (1987). The preliminary results of the administrative review were published on August 16, 1989 and Commerce determined margins of 67.405 for Koyo Seiko and 33.62% for NSK. *Tapered Roller Bearings Four Inches or Less in Outside Diameter and Certain Components Thereof From Japan; Preliminary Results of Antidumping Duty Administrative Review,* 54 Fed. Reg. 33,749 (1989). Koyo's margin was subsequently changed to 33.66% because the Department changed its computer program. *See* Administrative Record ("AR") (Pub.) Doc. 303. On September 20, 1990, Commerce published the final results in this administrative review, establishing a dumping margin of 52.17% for Koyo Seiko and 35.00% for NSK. *Final Results,* 55 Fed. Reg. at 38,729.

DISCUSSION

In reviewing a final ITA determination, this Court must uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988 & 1992 Supp.). Substantial evidence has been defined as being "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

I. COLLECTION OF INTEREST ON ESTIMATED DUTY DEPOSITS

Plaintiff's first contention is that Commerce improperly failed to collect interest on bonds which were posted by NSK and Koyo to cover estimated antidumping duties on the tapered roller bearings at issue. In its determination, Commerce determined that bond posting would not require collection of any interest from Koyo and NSK. *Final Results,* 55 Fed. Reg. at 38,726.

Pursuant to 19 U.S.C. § 1677g(a) (1992 Supp.), interest is collectable on "overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse * * *." The issue of interest collection was raised before this Court in *The Timken Co. v. United States* ("*Timken I*"), 15 CIT ____, 777 F. Supp. 20 (1991). In *Timken I,* this Court held that the statute requires interest only upon underpayments and overpayments of actual *cash deposits* against dumping duties found to be due, and not in a case in which importers posted a *bond. Id.*

Plaintiff, however, urges the Court to reconsider this issue. It claims that the entries covered in *Timken I* were nearly all made prior to 1980 at a time when the statute did not require the collection of interest. It further claims that the entries covered by this action were made during 1986–87, subsequent to the enactment and amendment of the interest provision, 19 U.S.C. § 1677g.

Regardless of plaintiff's contentions, the statutory language is clear on its face that interest is collectable only on deposits and not on bonds. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the Supreme Court stated that when evaluating an agency's statutory interpretation, the question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. The Court further stated that if "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. Furthermore, the statutory law is replete with references to "amounts deposited." *See* 19 U.S.C. §§ 1677g, 1673f(b) and 1675(a) (1988 & 1992 Supp.). There is no mention in any of these sections of amounts subject to a bond.

On other occasions, Congress has linked deposits and bonds together. *See* 19 U.S.C. §§ 1673b(d)(2) and 1673d(c)(1)(B) (1988 & 1992 Supp.).

The references in these sections to "cash deposit, bond, or other security," in the provisions are evidence that Congress knew how to specify bonds and other security when it wished to do so. Furthermore, plaintiff has not presented any new argument that would contradict Commerce's determination that "amounts deposited" do not include posted bonds. Thus, the ITA's determination on this issue was reasonable, supported by substantial evidence and in accordance with law and, therefore, is affirmed.

II. Cost of Production Adjustment

Plaintiff also challenges the ITA's use of Koyo's responses in determining Cost of Production ("COP"). Although Commerce "discovered minor errors in Koyo's COP response at verification," it decided that the responses "sufficiently supported its methodology of reporting costs." *Final Results,* 55 Fed. Reg. at 38,723. Plaintiff alleges that since-there were significant omissions in data, then Commerce should have resorted to the "best information available" standard in determining COP pursuant to 19 U.S.C. § 1677e(c). Specifically, plaintiff challenges the adjustments for material costs, labor costs and factory overhead.

A. *Material Costs:*

In verifying cost of material information the ITA relied in part on engineering drawings of the product's theoretical production requirements. *Final Results,* 55 Fed. Reg. at 38,723. In addition, the standard costs given for the six month review period were adjusted by a "variance based upon actual costs and quantities produced during the same six months' period." *Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Judgment Upon the Agency Record* at 17. The ITA also conducted five traces of the cost of materials utilized in production. *Id.* at 17 n.22; AR (Pub.) Doc. 200 at 32.

B. *Labor Costs:*

Regarding labor costs, Koyo responded to the investigative questionnaire by calculating a single three month variance which combined variances for direct labor and direct factory overhead. *Final Results,* 55 Fed. Reg. at 38,723. The variance was then applied to an estimation of basic labor costs derived from doubling the labor costs of a three month portion of the review period. The resulting figure represented the wages per processing cost center. *Id.*

Commerce also verified that Koyo's cost variances reflected the experience at both plants which produce TRB's within the scope of the finding. *Id.* In addition, it reconciled reported costs with Ministry of Finance reports on labor costs. AR (Conf.) Doc. 50 at 40–41.

C. *Factory Overhead:*

Plaintiff also challenges the accuracy of the ITA's verification of the reported factory overhead costs. Specifically, plaintiff contests the failure of the ITA to determine this adjustment on costs allocated to particular parts. The ITA instead chose to verify the total overhead cost. *Plaintiff's Brief* at 15; *Final Results,* 55 Fed; Reg. at 38,723.

Commerce's Selection of COP Data Was Reasonable:

The ITA "must verify all information which constitutes a basis for its final determination." *NTN Bearing Corp. of America v. United States,* 14 CIT ____, ____, 747 F. Supp. 726, 737 (1990). In accomplishing this task, whenever a significant number of sales or price adjustments are involved, Commerce is authorized to select "averaging or generally recognized sampling techniques," pursuant to 19 U.S.C. § 1677f–1(a)(1). This Court has previously held in *GMN Georg Muller Nurnberg AG v. United States,* 15 CIT ____, ____, 763 F. Supp. 607, 612 (1991), that:

> In light of the legislative interest in affording the agency greater flexibility and given the use of permissive rather than compulsory language in the wording of the statute, however, the Court is not convinced that Congress intended to limit Commerce's authority to the application of the sampling schemes enunciated therein.

The methodology selected by Commerce is to be upheld if "legally adequate and the results of the sampling have not been shown to be unrepresentative." *Asociacion Colombiana de Exportadores v. United States,* 13 CIT 13, 22, 704 F. Supp. 1114, 1122, *aff'd,* 901 F.2d 1089 (Fed. Cir. 1989), *cert. denied,* 111 S.Ct. 136 (1990). *See Smith Corona Corp. v. United States,* 15 CIT ____, ____, 771 F. Supp. 389, 401 (1991) (Commerce's discretion is limited to provide an alternative methodology which is not "unrepresentative or otherwise distortive of the results.") Review of the verification must also take into consideration that "[v]erification is a spot check and is not intended to be an exhaustive examination of the respondent's business." *Monsanto Co. v. United States,* 12 CIT 937, 944, 698 F. Supp. 275, 281 (1988).

In this case, the Court is convinced that Commerce acted reasonably in using Koyo's responses in determining cost of production. Furthermore, Timken has offered no evidence to show that Koyo's information was unreliable, nor have they offered any data more probative than Koyo's. Therefore, this Court finds that Commerce acted reasonably in using Koyo's data and Commerce's determination is affirmed as to this issue.

III. Adjustment of Credit Expenses for Compensating Balances

Plaintiff's third claim is that Commerce erroneously used NSK's home market credit expense that took account of so-called "compensating balances." Compensating balances are bank deposits held as security for outstanding loans. Many banks require a borrower to maintain an average account balance equal to a percentage of the outstanding loan, which effectively raises the real interest rate on the loan. *See PPG Indus., Inc. v. United States,* 14 CIT ____, ____, 746 F. Supp. 119, 124 n.8 (1990).

Commerce claims that it found the deposit of compensating balances a requirement of NSK's loan agreements and, therefore, granted a corresponding adjustment in the home market credit costs necessary for maintenance of a credit line. Timken avers that the expense was not

properly verified and that the adjustment was incorrectly allowed by the ITA.

Plaintiff bases its claim on two unrelated final determinations. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review,* 56 Fed. Reg. 31,692, 31,724 (1991); *Tapered Roller Bearings, Four Inches or Less in Outside Diameter and Certain Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Review,* 56 Fed. Reg. 26,054, 26,060 (1991).

The Court, however, must limit the scope of its review to the facts of the administrative determination before it. *See Daewoo Elecs. Co. v. United States,* 13 CIT 253, 274, 712 F. Supp. 931, 951 (1989); *Beker Indus. Corp. v. United States,* 7 CIT 313, 315 (1984); *Silver Reed America, Inc. v. United States,* 9 CIT 221, 225 (1985).

Timken also claims that the evidence on the record fails to substantiate whether the funds deposited with NSK's bank were deposited as a prerequisite for obtaining loans. Commerce rejected this argument claiming that:

> We examined and reviewed NSK's documents at verification. NSK supported the figures in its home market interest expense worksheets. As we have made this adjustment in the past, we based our calculations on the borrowing experience of the respondent and the interest rate actually paid.

Final Results, 55 Fed. Reg. at 38, 724.

Upon reviewing the verification report and all other evidence on the record, this Court finds that the evidence on the record indicates that funds deposited with NSK's bank were deposited as a prerequisite for obtaining loans. *See* AR (Pub.) Doc. 27 at 5, Exhibit 8; AR (Pub.) Doc. 201. Therefore, Commerce's determination as to this issue is affirmed.

IV. Programming Errors

Plaintiff's final claim is that Commerce committed several computer programming errors in its calculation of the final margins for both Koyo and NSK.

All parties agree that a remand is necessary to correct these errors. Therefore, this case is remanded to Commerce for correction of all computer programming errors.

Conclusion

In accordance with the foregoing opinion, this case is remanded to Commerce to correct all computer programming errors. Commerce's determination is affirmed in all other respects. Remand results are due within thirty (30) days of the date this opinion is entered. Any comments or responses by the parties to the remand results are due within fifteen (15) days thereafter. Any rebuttal comments are due within fifteen days (15) of the date responses or comments are due.

(Slip Op. 92–210)

TIE COMMUNICATIONS, INC., PLAINTIFF *v.* UNITED STATES, U.S. CUSTOMS SERVICE, AND DISTRICT DIRECTOR, CUSTOMS DISTRICT OFFICE, ST. ALBANS, VERMONT, DEFENDANTS

Court No. 91–04–00300

(Dated November 25, 1992)

Skadden, Arps, Slate, Meagher & Flom (Rodney O. Thorson) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jeffrey M. Telep, Vanessa P. Sciarra*), *Anna Tretter,* Office of Regional Counsel, United States Customs Service, of counsel, for defendant.

MEMORANDUM OPINION AND ORDER

MUSGRAVE, *Judge:* Upon consideration of the government's fourth Motion for an Extension of Time in which to file a response to plaintiff's cross motion for summary judgment and plaintiff's opposition thereto, this Court recently denied the government's motion in its October 27, 1992 order. Now the government comes before this Court for leave to file its response and its Supplemental Motion for Summary Judgment and Defendants' Memorandum In Support of its Supplemental Motion For Summary Judgment and In Response to Plaintiff's Cross Motion for Summary Judgment *out of time.* This motion is likewise denied. The Court considers the record closed and will consider the merits of the case based upon the record presently before it.

Defendant can find no solace for its dilatory behavior and inaccurate brief writing by merely rotating the case over from attorney to attorney. The defendant's pretense that it needed time "to complete the typing of an affidavit" to counter plaintiff's motion is also disingenuous[1] given the length of time that this matter has been in litigation and the government's own contention that it was "having difficulty identifying" a Customs official to be an affiant as of its last (fourth) request for an extension of time.[2]

In addition, defendant states as a reason for granting its motion that the Court is without subject matter jurisdiction under 28 U.S.C. 1581(i), claiming that "This is the first time in this proceeding that we have asserted this jurisdictional argument." Defendants' Motion at 2. This is a gross misstatement of the record as the jurisdictional issue was expressly raised and argued by it at the outset of this case in opposition to plaintiff's motion for a preliminary injunction (which the Court granted), and in support of its motion to dismiss (which the Court denied). In granting plaintiff's motion for a preliminary injunction, the Court "conclude[d] that the clauses pleaded herein [were] within the subject matter jurisdiction of this Court pursuant to 28 U.S.C. § 1581(i)

[1] Defendants' Motion for Leave to File Out of Time at 5.

[2] *See* Defendants' Consent [sic] Motion for Extension of Time, dated October 19, 1992, at 2 (Request *denied*).

* * *." To ignore the record on its face, and the plain language of the court orders contained within, severely tests the patience of this Court.

Lastly, the government claims that it needs to file an additional brief to inform this Court of two recent decisions, *United States v. Commodities Export Co.*, 972 F.2d 1266 (Fed. Cir. 1992) and *United States v. Menard, Inc.*, ____ CIT ____, 795 F. Supp. 1182 (1992), which it says are "dispositive" of the statute of limitations issue in this case. In essence, the government claims that there is no statute of limitations for recovery of duties under Section 1592.

In *Menard*, the Court did not reach the issue of whether there was "no specific limitation on the period during which the government must seek restoration of lost duties resulting from a violation of § 1592" (a contention put forth by the government). *See* 795 F. Supp. at 1187. The Court found it unnecessary to rule on that issue in disposing of that case. Similarly inconclusive, the *Commodities Export* case did not even involve a Section 1592 violation.

The Court takes note that the government has ignored the record in making this motion. Moreover, the Court takes a dim view of interposing unsubstantiated claims, supposedly based upon favorable precedents in this circuit, in the hope that this Court will conduct, on behalf of the litigant, extensive legal research in order to construct otherwise absent cogent legal arguments out of its moving papers.

In conclusion, the government's Motion for Leave to File Out of Time is Denied.

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